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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-856

SENATORS BARRY GOLDWATER, STROM THURMOND, CARL CURTIS, JAKE GARN, ORRIN HATCH, JESSE A. HELMS, GORDON HUMPHREY, JAMES A. MCCLURE, PAUL LAXALT; CONGRESSMEN ROBERT BAUMAN, STEVE SYMMS, LARRY MCDONALD, ROBERT DANIEL, JR., BOB STUMP, ELDON RUDD, JOHN ASHBROOK, GEORGE HANSEN, ROBERT K. DORNAN, JOHN H. ROUSSELOT, DON YOUNG, JAMES M. COLLINS, MICKEY EDWARDS, NEWT GINGRICH, DAN QUAYLE, CLAIR W. BURGENER, KENNETH B. KRAMER,
Petitioners,

v.

JAMES EARL CARTER, President of the United States,
CYRUS VANCE, Secretary of State,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

PRESIDENT JAMES EARL CARTER AND
SECRETARY OF STATE CYRUS R. VANCE, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Barry Goldwater, *et al.,* respectfully pray that a writ of certiorari issue to review the *en banc* judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals, the concurring opinion, and the dissenting opinion are not yet officially reported; they are reproduced in Appendix A at page 1a, 33a, and 47a respectively. The District Court's memorandum opinions and orders of October

17, 1979, and June 6, 1979, are also unreported, and appear respectively at pages 107a and 140a of Appendix B.

JURISDICTION

The final judgment of the Court of Appeals was entered on November 30, 1979. This Court's jurisdiction is invoked under § 1254(1) of the Judicial Code, 62 Stat. 928, 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the President has the absolute power under the Constitution to terminate the Mutual Defense Treaty with the Republic of China, without any form of approval by the Legislative Branch?

The District Court stated the question and its context as follows:

> "The essential dispute concerns the constitutional validity of President Carter's unilateral notice of termination of the Mutual Defense Treaty [with the Republic of China], given on December 23, 1978. . . . According to the notice, the termination will be effective January 1, 1980 pursuant to the termination clause contained in Article X of the treaty. The President has not submitted, for the purpose of obtaining legislative concurrence, the notice of termination to either the Senate or the Congress as a whole. Instead the President maintains, and has continued to maintain, that he possesses the unilateral authority under the Constitution to terminate the Mutual Defense Treaty with the Republic of China.
>
> * * * * *

[1] References in this Petition are made to page numbers found in the accompanying temporary Appendix and not the printed Appendix to be filed.

> "The prime question confronting the Court in this case is what governmental action is required by the Constitution to terminate the 1954 Mutual Defense Treaty with Taiwan. Because that treaty contains a termination clause stating that notice of termination may be given by either party, the narrower issue becomes whether the President of the United States is a 'party' for purposes of this clause and thus able to take unilateral action with respect to the notice of termination." (Footnotes omitted.) (App. at 110a-111a; 125a.)

CONSTITUTIONAL, TREATY, AND STATUTORY PROVISIONS INVOLVED

Relevant extracts from the constitutional, treaty, and statutory material involved in this case are set forth in Appendix C beginning at page 153a. They are:

Constitution, Art. I, sec. 8, cl. 18; Art. II, sec. 2, cl. 2; Art. II, sec. 3; Art. VI, cl. 2;

Mutual Defense Treaty of 1954, 6 U.S.T. 433;

International Security Assistance Act of 1978, § 26, 22 U.S.C. § 2151;

Taiwan Relations Act of 1979, Pub. L. No. 96-8, 93 Stat. 14 (1979), 22 U.S.C. §§ 3301, *et seq.;*

S. Res. 15 (Byrd Resolution), 96th Cong., 1st Sess. (1979), as adopted June 6, 1979, as a substitute for S. Res. 15, 96th Cong., 1st Sess. (1979), as amended and reported by the Senate Committee on Foreign Relations, 125 Cong. Rec. S7015 (daily ed. June 6, 1979); and

Summary of Treaty Termination Practice.

STATEMENT OF THE CASE

This is a suit brought by eight members of the United States Senate, a former Senator,[2] and 16 members of the House of Representatives, seeking a declaration that the President acted in excess of his constitutional powers in giving notice to the Republic of China of the termination of the Mutual Defense Treaty of 1954 between that country and the United States, without approval, in any form, by the Legislative Branch, and seeking injunctive relief.

On the merits, the District Court, in an opinion dated October 17, 1979, held:

> "Neither the executive nor legislative branch has exclusive power to terminate treaties. At least under the circumstances of this case—involving a significant mutual defense treaty with a faithful ally, who has not violated the terms of the agreement, and the validity of which has not otherwise been destroyed—any decision of the United States to terminate that treaty must be made with the advice and consent of the Senate or the approval of both houses of Congress.[3] That decision cannot be made by the President alone." (App. at 138a.)

The Court of Appeals, in a decision dated November 30, 1979, reversed, holding:

> "We find the President did not exceed his authority when he took action to withdraw from the ROC treaty, by giving notice under Article X of the Treaty, without the consent of the Senate or other legislative concurrences." (App. at 31a.)

[2] Senator Curtis' term of office ended after this suit was filed.

[3] Our footnote: The court analogized the requirement of action by the Senate to the treaty-making power, and said that the alternative requirement of action by both houses is based on congressional authority to repeal a law of the land, citing precedents for both alternatives. (App. at 131a-138a.)

The sequence of events prior to the decision of the District Court of October 17, 1979, was as follows:

The Mutual Defense Treaty of 1954, 6 U.S.T. 433 (App. at 155a), was signed December 2, 1954. The Senate gave its advice and consent to ratification thereof February 9, 1955. The treaty provides *inter alia* in Article V that each party will act to meet the common danger of an armed attack in the West Pacific area "in accordance with its constitutional processes." Article X of the treaty provides:

> "This Treaty shall remain in force indefinitely. Either Party may terminate it one year after notice has been given to the other Party."

On September 26, 1978, President Carter signed into law the International Security Assistance Act of 1978, 92 Stat. 746, 22 U.S.C. §§ 2151 *et seq.* (App. at 157a.) Section 26 of that Act provides:

> "Sec. 26. (a) The Congress finds that—
>
> "(1) the continued security and stability of East Asia is a matter of major strategic interest to the United States;
>
> "(2) the United States and the Republic of China have for a period of twenty-four years been linked together by the Mutual Defense Treaty of 1954;
>
> "(3) the Republic of China has during that twenty-four-year period faithfully and continually carried out its duties and obligations under that treaty; and

"(4) it is the responsibility of the Senate to give its advice and consent to treaties entered into by the United States.

"(b) It is the sense of the Congress that there should be prior consultation between the Congress and the executive branch on any proposed policy changes affecting the continuation in force of the Mutual Defense Treaty of 1954."[4]

On October 15, 1978, Congress adjourned. On December 15, 1978, while Congress was not in session, and without exercising his power to call a special session, President Carter publicly announced his unilateral decision to terminate the Mutual Defense Treaty with Taiwan, and to effect that decision by invoking Article X thereof.

This suit was filed one week later, on December 22, 1978. Notice was given to Taiwan the next day, December 23, 1978, that the Mutual Defense Treaty would terminate pursuant to Article X thereof on January 1, 1980.

On January 15, 1979, the first legislative day of the new Congress, Senator Harry F. Byrd offered Senate Joint Resolution 3, which he subsequently reintroduced on January 18, 1979, as Senate Resolution 15. (App. at 166a.) Each time the Majority Leader objected to immediate consideration. The resolution provided:

"That it is the sense of the Senate that approval of the United States Senate is required to terminate any mutual defense treaty between the United States and another nation."

[4] Subsection (b) was added in the Senate by a vote of 94-0. 124 Cong. Rec. S11726-27 (daily ed. July 25, 1978).

On April 10, 1979, the President signed the Taiwan Relations Act, Pub. L. No. 96-8, 93 Stat. 14, 22 U.S.C. §§ 3301, *et seq.* Section 15 of that act expressly confirms the continuing existence of a government of Taiwan, notwithstanding recognition of the People's Republic of China:

"[T]he term 'Taiwan' includes, as the context may require, the islands of Taiwan and the Pescadores, the people on those islands, corporations and other entities and associations created or organized under the laws applied on those islands, *and the governing authorities on Taiwan* recognized by the United States as the Republic of China prior to January 1, 1979, *and any successor governing authorities* (including political subdivisions, agencies, and instrumentalities thereof)."[5] (Emphasis added.)

And section 4(c) explicitly provides that all treaties with the government of Taiwan shall remain in force until lawfully terminated:

"For all purposes, including actions in any court in the United States, the Congress approves the continuation in force of all treaties and other international agreements, including multilateral conventions, entered into by the United States and the governing authorities on Taiwan recognized by the United States as the Republic of China prior to January 1, 1979, and in force between them on December 31, 1978, unless and until terminated in accordance with law."

Some 60 treaties and other international agreements between the United States and the Republic of China, including the Mutual Defense Treaty, are now in force. Department of State, *Treaties in Force* at 230-33

[5] See also section 4(b) of the Taiwan Relations Act.

(January 1979). The notice of termination related only to the Mutual Defense Treaty.

On June 6, 1979, the District Court dismissed Plaintiffs' complaint without prejudice on the ground that plaintiffs lacked standing. (App. at 140a.)

The Senate reacted immediately. In the District Court's words:

> "On June 6, 1979, within hours after the Court's initial ruling in this case, the United States Senate voted 59 to 35 to adopt an amendment proposed by Senator Harry F. Byrd, containing language identical to original Senate Resolution 15, as a substitute for the substitute amendment proposed by the Senate Foreign Relations Committee. 125 Cong. Rec. S7038-7039 (June 6, 1979). The language adopted by the Senate vote reads as follows:
>
> > "That it is the sense of the Senate that approval of the United States Senate is required to terminate any mutual defense treaty between the United States and another nation."[6]
>
> (Footnotes omitted.) (App. at 116a-117a.)

As the District Court said:

> "By that vote, the Senate rejected a Committee substitute that would have expressly approved of the action taken by the President in terminating this treaty." (Footnotes omitted.) (App. at 118a.)

[6] The Senate Foreign Relations Committee on May 1 had reported S. Res. 15 with an amendment to strike all after the resolving clause and insert substitute language providing several grounds for unilateral Presidential termination of treaties, including cases where a treaty has a termination clause. 125 Cong. Rec. S5018. It was this substitute Committee amendment that was rejected by the Senate and replaced with the Byrd amendment on June 6.

The District Court noted that the 59-35 vote of June 6, 1978, in favor of the Harry F. Byrd resolution, also "stands as the last expression of Senate position on its constitutional role in the treaty termination process." (App. at 118a.)

On June 12, 1979, Plaintiffs moved for reconsideration of the District Court's June 6 order, and hearing was held on July 12, 1979.

On October 17, 1979, the District Court issued its decision, holding that Petitioners have standing, that the case presents a justiciable controversy, and, on the merits, that the President's action violated the Constitution.

The Court of Appeals, on November 30, 1979, after a hearing *en banc,* in a *per curiam* opinion, reversed the District Court on the merits (Judge MacKinnon dissenting), while sustaining that court's holding as to standing (Judges Wright and Tamm dissenting), and as to justiciability.[7]

Both the District Court and the Court of Appeals recognized that there is a gap in the Constitution with respect to termination of treaties. They differed as to how this gap is to be filled. The District Court reasoned that the principle of separation of powers and the system of checks and balances which permeates the Constitution was not intended by the Framers to be displaced in this one instance. The Court of Appeals, on the other hand, reasoned that the foreign affairs power is constitutionally lodged in the Executive and was intended to be exercised without restriction, unless expressly stated, and since the Constitution does not

[7] The court said: "There are no votes to reverse founded on the political question doctrine." (App. at 2a.)

expressly impose such a restriction (*e.g.*, concurrence by the Legislative Branch) the Executive has power to terminate a treaty without the consent of the Senate or the Congress.

Both courts took note of the provision of Article X of the treaty which gives either "Party" the right to terminate on one year's notice. The District Court construed "Party" to mean "government," not "President," and therefore concluded that the privilege of termination must be exercised through constitutional processes, which, as previously indicated, connote a power shared by the Executive and Legislative Branches.

The Court of Appeals, on the other hand, reasoned that the termination clause does not designate who shall act, and, since no specific role is spelled out in either the Constitution or this treaty for the Senate or Congress as a whole, the power of termination consequently devolves on the President.

Chief Judge Wright and Judge Tamm concurred in the result of the judgment, arguing that Petitioners lacked standing to bring the suit. The majority opinion answered this argument in some detail.

The dissenting opinion of Judge MacKinnon in the Court of Appeals argued that the Constitution requires that the termination of a treaty be approved by both Houses of Congress, reasoning that since the supremacy clause (Article VI) makes a treaty, along with the Constitution and acts of Congress, the supreme law of the land, a treaty, like a statute, can only be repealed by a statute. His opinion contains an exhaustive analysis of writings of Framers of the Constitution, as well as the practice followed in the termination of treaties, which he finds, in 52 cases out of 54, to have received the concurrence of Congress.

REASONS FOR GRANTING THE WRIT

I

The Court of Appeals Has Decided an Important Question of Constitutional Law Which Has Not Been, but Should Be, Settled by This Court.

The Court of Appeals, in sustaining the President's authority to exclude Congress from participation in the decision to terminate a mutual defense treaty, has made an important and unprecedented allocation of constitutional powers between the Executive and Legislative Branches of the Federal Government. No other president has claimed such authority. No other court has ever asserted that he possesses it. The singular gravity of the question, and of the Court of Appeals' resolution of it, cannot be swept under the rug, by attempting (as the Court of Appeals did) to restrict the scope of the opinion to this one treaty.

A notice of termination clause similar to Article X of the Mutual Defense Treaty with Taiwan appears in at least four other mutual defense treaties: the NATO Treaty of April 4, 1949, Art. 13, 4 Bevans 828; the Security Treaty with Japan of January 19, 1960, Art. X, 11 U.S.T. 1758; the Mutual Defense Treaty with the Philippines of August 30, 1951, Art. VIII, 3 U.S.T. 3947; and the Mutual Defense Treaty with Korea of October 1, 1953, Art. VI, 5 U.S.T. 2368. And at least five other major treaties identified with national defense contain similar clauses: the Nuclear Test Ban Treaty, Art. IV, 14 U.S.T. 1313; the Statute of the International Atomic Energy Agency, Art. XVIII, 8 U.S.T. 1093; the Nuclear Non-Proliferation Treaty, Art. X, 21 U.S.T. 483; the Biological Weapons Convention, Art. XIII, 26 U.S.T. 583; and the Outer Space Treaty, Art. XVI, 18 U.S.T. 2410.

The reason for the absence of judicial precedents [8] is that never before in the history of the Republic has a President attempted to terminate a mutual defense treaty or any other important treaty without the approval of Congress. Indeed, the only mutual defense treaty which this country has ever terminated was the 1778 treaty of alliance with France, which was terminated directly by an act of Congress,[9] without any direct communication by the President to France. (App. at 51a.)

If the President has constitutional power to terminate the Mutual Defense Treaty with Taiwan, acting alone, any future president, acting alone, can terminate any of the important treaties mentioned above, subjecting the United States to hazards from which

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[8] While no court has ever decided the question presented by this case, there are strong dicta in two opinions of this Court to the effect that treaty termination is a shared power. In the *Amiable Isabella*, 6 Wheat. (19 U.S.) 1 (1821), this Court said:

> "[T]he obligations of the treaty could not be changed or varied but by the same formalities with which they were introduced; or at least by some act of as high an import, and of as unequivocal an authority." *Id.* at 75.

And in *Clark* v. *Allen*, 331 U.S. 503 (1947), the Court quoted with approval the following statement by Judge Cardozo in *Techt* v. *Hughes*, 229 N.Y. 222, 243; 128 N.E. 185, 192 (1920), *cert. denied*, 254 U.S. 643 (1920):

> "[T]he President *and* senate may denounce the treaty, and thus terminate its life. Congress may enact an inconsistent rule, which will control the action of the courts." *Id.* at 509 (Emphasis added).

[9] It is notable that this statute followed some six years after Thomas Jefferson, as Secretary of State, had cautioned President Washington that the termination of an alliance was the most certain way of making a bitter enemy out of a friend. He specifically cautioned that withdrawal from an alliance would give "just cause" for war by the other nation. 6 The Writings of Thomas Jefferson 225, 231 (P. Ford ed. 1895).

the Senate intended to protect our country by granting its advice and consent to their ratification. *See* dissenting opinion of Judge MacKinnon at App. 56a, 90a-92a. The importance of a novel decision vesting such power in one man, free of the checks and balances of the Constitution, needs no elaboration. It cries for review by this Court.

II

The Decision Below Expands the Concept of the President's Foreign Affairs Power on an Unprecedented Scale.

The Court of Appeals decision is based on 10 enumerated "considerations." The decision is noteworthy in that it does not identify any single reason or theory for its conclusion that the Constitution does not require legislative participation in the termination of the Mutual Defense Treaty. Rather, the court relied on what it termed the "totality" of "various considerations." App. at 14a-15a. The opinion, in the court's own words, does not indicate "that any one factor or combination of factors is determinative." *Id.* They are somehow all "knit together" (App. at 29a) in a fashion that forms a patchwork quilt which would robe the Presidency in power never before claimed by any other president or declared by any other court. The decision also makes sweeping statements of presidential power that could prove dangerous in areas other than treaty termination. The "considerations" underlying the court's opinion are unsupported by any historical precedent. Incredibly, the intent of the Framers is nowhere mentioned in the court's opinion. The basic judicial support is Justice Sutherland's "oft-repeated" *dictum* in *United States* v. *Curtis-Wright Export Corp.*,

299 U.S. 304, 319 (1936), that the President is the "sole organ" in foreign affairs; that dicta has now been stretched to mean that the president is the "sole maker" of foreign policy. The principal authority and overriding theme of this decision is that expediency legitimizes the President's action.

Petitioners believe that a brief analysis or review of these 10 reasons in the decision will clearly demonstrate that the Court of Appeals' manner of reasoning does violence to this Court's consistent and careful analytical approach to constitutional interpretation. For that reason, the decision below demands review.

1. The substance of the Court of Appeals' first consideration is that since the appointment clause and treaty clause both contain a role for Senate participation, and since some purely executive officers, such as Ambassadors or Postmasters, can be removed by the President alone, the President is thereby granted some authority to similarly "remove" or terminate treaties. As Judge MacKinnon correctly remarked:

> "That this point is made in a serious vein is unbelievable and illustrates lack of depth of analysis." (App. at 100a.)

The Court of Appeals, while professing to avoid "abstract logic or sterile symmetry" does exactly that by trying to compare the "appointment" clause with the treaty clause. But even if one were to compare the powers of the two branches under each clause, the comparison support petitioners' position. As Professor Arthur Bestor has written:

> "[I]f the analogy [between the removal power and the treaty power] is to be appealed to at all, it is more convincing when applied the other way round . . . . The President's ability to take care that the laws be faithfully executed may well be said to depend on his possession of removal power. But a power to change the law (whether established by statute or treaty) is something utterly different—a contradiction rather than a corollary of the responsibility for seeing to its faithful execution." Arthur Bestor, "Location of the Constitutional Power to Abrogate or Terminate a Treaty: The Original Intent of the Constitution Historically Examined," 125 Cong. Rec. S 1607, 1609 (daily ed., February 21, 1979).

2. Next, the court reasons that, because the primary purpose of the Supremacy Clause is to make the Constitution, federal law, and treaties superior to state law, the clause does not afford the basis for a determination that a treaty must be terminated either (1) by the same process by which it was made, or (2) by the process by which statutes are terminated.

The conclusion simply does not follow from the premise. Federal statutes are part of the Supreme Law of the Land, yet they are repealed by the same process by which they are made (although the Constitution does not expressly say so). Why should treaties, which are on an equal footing with statutes, be any different?

Moreover, the use of the Supremacy Clause has been extended to matters other than conflicts between Federal and state law. For example, it has been used to reconcile conflicts between treaties and Federal stat-

utes,[10] and to determine the operative effect of treaties.[11] Thus, the mere fact that this case does not involve a conflict with state law does not prevent the use of the Supremacy Clause in the constitutional construction necessary to the resolution of the question presented in this case.

3. The Court of Appeals argues that it does not follow "that a constitutional provision for a special concurrence (two-thirds of the Senators) prior to entry into an entangling alliance necessarily applies to its termination in accordance with its terms." (App. at 18a).

This statement is a contradiction of everything known about the intent of the Framers and Founders of our government and is unsupported by any citation to the Framers or Founders. The court three times uses the emotionally charged term "entangling" alliance as a cover for its lack of historical evidence.

Actually, the Framers were as much concerned with preserving treaties, including treaties of alliance, as they were with making it difficult to initially enter into such agreements. Gouverneur Morris specifically said at the Constitutional Convention that "the more difficulty in making treaties, the *more* value will be set on them." 2 *Records of the Federal Convention of 1787,* at 393 (M. Farrand ed. 1937) (emphasis added) Thomas Jefferson warned, in an official opinion written as Secretary of State a mere six years after the convention, that the termination of an alliance was the most certain way of making a bitter enemy out of a

[10] *See, e.g., Whitney* v. *Robertson,* 124 U.S. 190 (1888).

[11] *See, e.g., Foster* v. *Neilson,* 2 Pet. 253 (U.S. 1829).

friend. He specifically cautioned that withdrawal from an alliance would give "just cause for war" by the other nation. 6 *The Writings of Thomas Jefferson* 225, 231 (P. Ford ed. 1895).

The Founders' fear of giving cause for war by termination of an alliance and their well-known preoccupation with preserving valuable and hard won treaty rights, such as fisheries or navigation, prove beyond any question that the unmaking of treaties was not vested as an absolute power in a single officer of government.

4. The Court of Appeals uses the general language of Article II, section 1, of the Constitution, as a basis for finding the existence of a broad presidential power to abrogate treaties generally. The court concludes that the "powers conferred upon Congress in Article I of the Constitution are specific, detailed, and limited, while the powers conferred upon the President by Article II are generalized in a manner that bespeaks no such limitation upon foreign affairs powers." (App. at 18a-19a). From this, the court says that it "would take an unprecedented feat of judicial construction to read into the Constitution an absolute condition precedent of congressional or Senate approval for termination of all treaties, similar to the specific one relating to initial approval." (App. at 20a).

The Court of Appeals itself attempts an unprecedented feat of construction by transforming the sparse enumeration of executive powers of Article II into an absolute power of treaty termination which the Framers unmistakably omitted from the text. It is beyond dispute that the Framers were distrustful of executive power and shrank from placing kingly authority

anywhere. Madison emphasized at the Constitutional Convention that the Framers meant "to *fix the extent* of the executive authority," not to confer open-ended powers. 1 *Records of the Federal Convention of 1787,* at 66 (M. Farrand ed. 1937). (emphasis added) Madison added that "executive powers [should] be confined and defined—if large we shall have the Evils of elective Monarchies." *Id.* at 70.

The underlying question in this case is whether Article II of the Constitution shall be construed as delegating to the President all executive power, including what has been called the foreign affairs power, without restraint unless a specific restriction can be found in the Constitution as the Court of Appeals believed, or shall be construed as delegating to the President only such powers as are consistent with the system of divided powers and checks and balances of the Constitution as a whole, as the District Court firmly held.

The rationale of the Court of Appeals' opinion in this respect is clearly in conflict with that of this Court in *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952), which rejected a similar argument (that executive power under Article II is plenary unless expressly limited in the Constitution), offered to justify the President's seizure of the Nation's steel mills without statutory authority.

Justice Black, writing for the Court, said:

> "It is clear that if the President had authority to issue the order he did, it must be found in some provision of the Constitution. And it is not claimed that express constitutional language grants this power to the President. The contention is that presidential power should be implied from

> the aggregate of his powers under the Constitution. Particular reliance is placed on provisions in article II which say that 'The executive Power shall be vested in a President . . .'; that 'he shall take Care that the Laws be faithfully executed'; and that he 'shall be Commander in Chief of the Army and Navy of the United States.' *Id.* at 587.

Rejecting this argument, Justice Black continued:

> "Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President. In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Id.*

And so the theory of "the aggregate of his powers under the Constitution" (reasserted by the Court of Appeals here in strikingly similar language) was rejected.

Justice Frankfurter in his concurring opinion went at it from another direction: that the constitutional concept of checks and balances was controlling. Speaking of the intent of the Framers, he said:

> "To that end they rested the structure of our central government on the system of checks and balances. For them the doctrine of separation of powers was not mere theory; it was a felt necessity. Not so long ago it was fashionable to find our system of checks and balances obstructive to effective government. It was easy to ridicule that system as outmoded—too easy. The experience through which the world has passed in our own day has made vivid the realization that the Framers of our Constitution were not inexperienced doctrinaires. These long-headed statesmen had no illusion that our people enjoyed biological or psychological or

sociological immunities from the hazards of concentrated power. It is absurd to see a dictator in a representative product of the sturdy democratic traditions of the Mississippi Valley. The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority." *Id.* at 593-94.

Justice Frankfurter might have been speaking of the present case when he said:

> "Absence of authority in the President to deal with a crisis does not imply want of power in the Government. Conversely the fact that power exists in the Government does not vest it in the President. The need for new legislation does not enact it. Nor does it repeal or amend existing law." (*Id.* at 603-04).

Justice Jackson, referring to the argument that Article II is a delegation of all executive power not specifically restricted, said:

> "I cannot accept the view that this clause is a grant in bulk of all conceivable executive power but regard it as an allocation to the presidential office of the generic powers thereafter stated." *Id.* at 641.

Justice Jackson also attacked the notion, repeated in the President's brief in the Court of Appeals, that there had been an aggregation of powers in the President, from custom, never judicially tested:

> "The Solicitor General lastly grounds support of the seizure upon nebulous, inherent powers never expressly granted but said to have accrued to the office from the customs and claims of preceding administrations. The plea is for a resulting

> power to deal with a crisis or an emergency according to the necessities of the case, the unarticulated assumption being that necessity knows no law.
>
> "Loose and irresponsible use of adjectives colors all non-legal and much legal discussion of presidential powers. 'Inherent' powers, 'implied' powers, 'incidental' powers, 'plenary' powers, 'war' powers and 'emergency' powers are used, often interchangeably and without fixed or ascertainable meanings.
>
> "The vagueness and generality of the clauses that set forth presidential powers afford a plausible basis for pressures within and without an administration for presidential action beyond that supported by those whose responsibility it is to defend his actions in court. The claim of inherent and unrestricted presidential powers has long been a persuasive dialectical weapon in political controversy. . . ." *Id.* at 646-47.

The instant case presents again the choice between a claim of inherent powers in the President, unchecked unless a specific restraint be found in the Constitution, and a concept of checks and balances among the three branches of government which is a general restraint upon all powers of the Executive, whether or not explicitly so restrained.

The Court of Appeals decision in this case cannot be affirmed without unsaying the key utterances of the Justices' opinions in the *Youngstown Sheet and Tube* case.

5. The next "consideration" identified by the Court of Appeals is its conclusion that the Constitution confers primary responsibility for the international aspects of treaty making on the President, and primary

responsibility for the domestic aspects of treaty making on the Congress. However, this conclusion detracts from, rather than supports, the notion that Congress can be by-passed or excluded from the domestic processes of treaty termination.

The respective roles of Congress and the President in the domestic and international aspects of treaty termination have been identified and analyzed by Professors McDougal and Reisman in a series of recent articles.[12] As explained by McDougal and Reisman, and as the District Court noted (App. at 131a), it is an unrealistic simplification to view treaty termination as a single act. In fact, treaty termination usually involves at least four distinct, sequential acts: (1) the formulation of the policies to terminate, (2) negotiations with the other party, (3) repeal of the law of the land, and (4) notice of the termination. Two of these sequential acts—negotiation and notice of termination—are within the exclusive competence of the President. But Congress has always had competence in the acts of policy determination and repeal of the law of the land. This conclusion is indicated by repeated statements of the Framers and Founding Fathers, which are nowhere mentioned in the Court of Appeals' opinion, and in the subsequent practice of the federal government in treaty termination during the past 200 years.

6. The Court of Appeals states that in "many . . . situations the President must take immediate action" to terminate treaties. From this policy observation, the

[12] Reisman & McDougal, "Who Can Terminate Mutual Defense Treaties?", The National Law Journal 19 (May 21, 1979); *id.* at 17 (May 28, 1979); *id.* at 15 (July 23, 1979).

court draws the conclusion that congressional participation in termination would "deny the President the authority necessary to conduct our foreign policy in a rational and effective manner." (App. at 22a).

The practice of finding a power based on political expediency was condemned by Chief Justice John Marshall, who wrote:

> "The peculiar circumstances of the moment may render a measure more or less wise, but cannot render it more or less constitutional." *John Marshall's Defense of McCulloch* v. *Maryland* at 190-91 (G. Gunther ed. 1969).

The doctrine of judicial construction put forth by the Court of Appeals would serve as the means for Presidential usurpation of all powers belonging to other branches of government. If the President alone is allowed to make for the nation the final decision of when he "must take immediate action" in order to conduct foreign affairs "in a rational and effective manner," he becomes the ultimate arbiter of his own powers, free of any judicial responsibility to say what the law is.

The basic conclusion of the Court of Appeals is also flawed because there is nothing in a requirement of congressional participation to prevent his immediate action. He may exercise his routine authority to submit a Presidential message to the Congress asking for immediate action on his request for a grant of authority. He may call a special session of the Congress for such purpose if that body has adjourned. Or he may act immediately to give notice of termination and promptly thereafter seek congressional ratification of his action.

7. The Court of Appeals indicates there is no settled consistent method by which the legislature has been involved in treaty termination (App. at 22a-23a). What *is* settled is that, regardless of the various legislative methods of granting authority (concurrent resolution, Senate resolution, act of Congress, etc.) or their timing (before or after the notice of termination), there have been *two and only two sources* of legislative authority: a majority (or greater) approval of both Houses of Congress, or two-thirds (or greater) approval by the Senate.[13] The court thus ignores the critical fact that the Legislative Branch has participated in virtually all cases of treaty termination, and that this is the first case in history in which a President has deliberately sought to exclude the Legislative Branch from any participation at all.

While some 54 treaties to which the United States is a party have been terminated by the United States, there has never been an occasion, until now, for anyone to challenge the constitutionality of what was done. This is because, in all but two cases, the President acted at the direction of or with the concurrence of Congress, expressed in one form or another. The exceptions can be "readily distinguished," as the District Court found

[13] Thirty-nine treaties were terminated upon the initiative of Congress. Four others were terminated with legislative approval after express Presidential requests for such authority. In two others, Congress expressly or impliedly authorized the President to take action which nullified an earlier treaty. In seven instances, Congress enacted statutes inconsistent with extant treaties, necessitating withdrawal from those agreements. In these 52 cases, therefore, the President was not asserting a power to exclude Congress from participation in treaty termination (as here), and there was therefore no occasion for a challenge. See Summary of Treaty Terminations, App. at 167a and the dissenting opinion of Judge McKinnon, App. at 63a, *et seq.*

(App. at 127a), and in any event they scarcely could create a new constitutional power. As Judge McKinnon's powerful dissent states:

> "On examination it appears that among the 13 instances upon which the President relies, there were only two minor treaties in which the President could be said to have acted alone since 1788. Reliance upon such miniscule precedent forcibly illustrates the great weakness in the President's claim to *absolute power* in the present circumstances involving a Defense Treaty.
>
> "Also, practically all of the 13 instances upon which the President relies were of such minor impact, or so non-controversial and widely approved that no person would have suspected that such instances would later be claimed as precedents to support an *absolute* Presidential unilateral power to terminate major defense treaties. An evolution of such great power from so little was never broached or envisioned. Thus does even minor usurpation gnaw away at constitutional rights. Fortunately, however, the imprimatur of law is not lightly awarded. Even the enactment of many statutes and lengthy acquiescence by Congress and the President in constitutional infractions will not support a non-existent power or unwarranted constitutional construction. *Field* v. *Clark,* 143 U.S. 649 (1892); *James* v. *U.S.,* 202 U.S. 401 (1903); *U.S.* v. *Boyer,* 85 Fed. 425 (D.C. Mo. 1898). Usurpation does not make constitutional that which is unconstitutional." (*Id.* at 90a-91a) (emphasis in original).

The next point made by the majority is that:

> "There is . . . widespread agreement that the President has the power as Chief Executive under many circumstances to exercise functions regarding treaties which have the effect of either terminating or continuing their validity." (Footnote omitted.) (App. at 23a).

In support of this proposition, the court cites a report of the Senate Foreign Relations Committee which lists 14 situations in which a state under international law may withdraw from or suspend a treaty. Here, the court has confused the right of the United States under international law to withdraw from a treaty, and the right of the President under the Constitution to effect such withdrawal by the United States. There is widespread agreement that a state may withdraw from a treaty in conformity with its provisions; and, in the present case, there is no question that the United States under international law may withdraw from the Mutual Defense Treaty pursuant to Article X. However, there is clearly no widespread agreement to the effect that the President under the Constitution may make the decision to withdraw from a treaty without legislative consent. Indeed, the Senate on June 6, 1979, expressly rejected the Senate Foreign Relations Committee's resolution which would have given the President the power to act without legislative consent to terminate a treaty in any of the 14 situations where a right of termination may exist under international law.

8. The Court of Appeals cannot find any "judicially ascertainable and manageable method of making any distinction among treaties on the basis of their substance, the magnitude of the risk involved, the degree of controversy which their termination would engender, or by any other standards." From this, the court concludes it cannot "lay down any hard and fast constitutional rules." (App. at 26a.)

First, the court could easily lay down the general rule, as did the District Court, that "some form of congressional concurrence is required" in terminating all treaties. (App. at 136a). By adopting such a rule,

the court would not need to involve itself in making any of the difficult distinctions it foresees. It would be merely confirming that the predominant past practice is constitutionally based.

Second, the court ignored at least two strong grounds for making a distinction (if one needs to be made) in the case at bar based on the clear legislative history of the Mutual Defense Treaty and the status of the treaty as a defense alliance. The setting in which the treaty was concluded proves that congressional concurrence was required for its termination by the United States. The U. S. Ambassador to the Republic of China at the time the treaty was negotiated states that "it never dawned on the negotiators that the treaty would be terminated by the President acting alone." 125 Cong. Rec. S15797 (daily ed. Nov. 2, 1979). Moreover, the treaty clearly involves, and directly impinges on, the power of the Congress to declare war and to appropriate funds for the common defense.

In short, the role of the judiciary is not difficult or improper in this case.

9. The Court of Appeals also states that the recognition power of the President is "an important ingredient in the case at bar," but denies that it "automatically gives the President authority to take any action that is required or requested by the state being recognized." (App. at 28a.) Nevertheless, the court, in effect, uses this power as a bootstrap for the President, acting alone, to comply with all demands of the foreign government, including the unilateral termination of a mutual defense treaty. *Id.*

Two mutually inconsistent arguments are given as to the effect of recognition of the PRC on the treaty.

One argument is that recognition of the People's Republic, without taking exception to its claim to be the sovereign over Taiwan as well as the mainland, ipso facto, gives the President power "to determine that there is no meaningful vitality to a mutual defense treaty when there is no recognized state." *Id.* This conflicts with what the court itself recognizes elsewhere the President in fact did, which was to deem that treaty as continuing in effect, despite his recognition of the People's Republic, by asserting, "on behalf of the United States, the privilege of terminating the Treaty by appropriate notice as provided by its own terms." (App. at 3a, n.2).

The other argument is that "the United States has evolved for Taiwan . . . a novel and somewhat indefinite relationship, namely, of unofficial relations with the people of Taiwan." (App. at 28a.) The direct refutation of the premise of this argument is the testimony before the Senate Foreign Relations Committee on February 8 of this year by two high level State Department officials who said that the United States can and will implement and carry out its obligations under the treaty until 1980, even though we have an unofficial relationship with Taiwan.

In response to the question by Senator Muskie of how the United States could "implement" a defense treaty with a nation we do not recognize, Roger Sullivan, Deputy Assistant Secretary of State for East Asian and Pacific Affairs testified:

> SULLIVAN: If there were any threat to the security of Taiwan we could consult with *the authorities* on Taiwan. We would find a way to consult.

Hearings on the Taiwan Relations Act, S.254 Before the Senate Comm. on Foreign Relations, 96th Cong., 1st Sess. at 688 (1979) (emphasis added).

When asked by Senator Glenn to respond to the same question, Herbert Hansell, the Legal Adviser of the State Department testified:

> HANSELL: . . . we would find the means to do it, unofficial or otherwise, to perform our obligations under the treaty. * * *
>
> The fact of the matter is we would find the mechanism to do whatever had to be done regardless of whether it was official or unofficial channels. *Id.*

Senator Muskie then summed up this colloquy:

> MUSKIE: What you are saying then is that the treaty is still binding on us for that year (1979)?
>
> SULLIVAN: Yes, sir, *absolutely.*
>
> MUSKIE: *In the fullest sense?*
>
> SULLIVAN: Yes, sir.

Id. (emphasis added)

What is presently significant is that (1) this Court has never held that the recognition power is ground for treaty termination, or anything like it, and (2) if the argument were accepted that the President derives power from the demands of a foreign government that the Constitution does not otherwise give him, to be exercised free of any participation by the Legislative Branch, the powers of the Presidency would have no limit. For example, if the Soviet Union, taking a leaf from the book of the People's Republic, were to demand that the President (acting alone) should give

notice of termination of the NATO treaties, as a condition to continuance of our recognition of the Soviet Union (and their recognition of the United States), would the President have the constitutional power to dissolve those safeguards to the national defense? Apparently he would, unless the decision of the Court of Appeals is reversed.

10. The final consideration by the Court of Appeals, stated to be of "central significance" and an "overarching factor", is the fact that the Mutual Defense Treaty (like most other United States treaties) contains a termination clause, and thus, the President's power was at its "zenith" in terminating the treaty. Such a characterization of Presidential power completely distorts this Court's teachings, especially that in *Youngstown Sheet & Tube* v. *Sawyer,* 343 U.S. 579 (1952), wherein it was stated that the President's power is at its "lowest ebb" in circumstances comparable to the case at bar. *Id.* at 637 (Jackson, J. concurring).

The Court of Appeals recognized that the President acted "without the consent of the Senate or other legislative concurrences." (App. at 31a). Indeed, in view of the historically based practice of a shared-role in treaty termination; the passage of the Dole-Stone Amendment calling for prior consultations before the termination of this treaty; the Taiwan Relations Act, specifically preserving all treaties with Taiwan without exception; and the Senate vote on June 6, 1979 for the Harry Byrd substitute amendment, the President's action here is in *conflict* with Congressional expression.

The absence of an express condition in the Mutual Defense Treaty spelling out a role for the Senate or

the Congress for its termination is also not significant since it was generally understood from past practice that termination of treaties, including those with termination clauses similar to that here, required approval of the Congress, or at least the Senate.[14] Furthermore, the absence in the Constitution itself of a provision for treaty termination does not mean that the "power consequently devolves upon the President" as the Court of Appeals would have it. This Court clearly stated in *Youngstown Sheet and Tube* that the President is *not presumed* to have the power to act in any particular circumstance. His power "*if any,* . . . must stem either from an act of Congress or from the Constitution itself." 343 U.S. at 585. It cannot stem from or be created out of a gap in the Constitution.

CONCLUSION

This case presents an important question of federal constitutional law which has never been decided by this Court. Failure to review the decision of the Court of Appeals would also let stand a dangerous precedent for Executive usurpation of Congress' historically and constitutionally based powers. For all the foregoing reasons, the petition for a writ of certiorari should be granted.

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[14] Significantly, the first treaty terminated pursuant to its terms was in 1846 when Congress enacted authority for President Polk to give notice of termination of the Oregon Territory Convention with Great Britain. 9 Stat. 109-110.

Respectfully submitted,

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v.

JAMES EARL CARTER, PRESIDENT OF THE UNITED STATES, AND CYRUS VANCE, SECRETARY OF STATE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF

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PETITIONERS' SUPPLEMENTAL BRIEF

Petitioners, pursuant to Supreme Court Rule 24(5), hereby file this Supplemental Brief in further reply to Respondent's Brief in Opposition at page 16 concerning the original design and intent of the Framers. Respondent's argument is so contrary to the historical record that Petitioners believe it imperative to answer with the words of the Framers themselves which, because of time constraints, have not heretofore been brought to this Court's attention.

Respondents argue the Framers were silent on treaty termination both at the Constitutional Convention and in the document and would have the Court infer that the Framers meant for the President to act alone. Actually, the consistent statements and actions of at least twelve of the most prominent Framers and Founding Fathers, including George Washington, Thomas Jefferson, James Madison, John Jay, James Wilson, Alexander Hamilton, Gouverneur Morris, George Mason, C. C. Pinckney, Rufus King, Hugh Williamson, and James Iredell, prove that treaty termination was designed to be a shared power exercised by the President with some form of concurrence by the legislature.

Thus, John Jay declared in The Federalist:

> "They who make laws may, without doubt, amend or repeal them; and it will not be disputed that they who make treaties may alter or cancel them. . . ." The Federalist, No. 64, at 394 (Rossiter ed. 1861).

Respondents have claimed below that the words by John Jay are "ambiguous." (R. 397). The Nation's leading authority on John Jay disagrees. Professor Richard B. Morris, Gouverneur Morris Professor of History Emeritus at Columbia University and editor of The Papers of John Jay, states:

> "It just so happens that I have before me a copy of the original draft of 'Federalist' Letter No. 64 in Jay's own handwriting, with some variances from the published text. Throughout Jay is talking about treaty-making as a shared function, and it is a fair inference from his text that he would have regarded treaty termination in the same light." 125 Cong. Rec. S15718 (daily ed. Nov. 1, 1979).

In part Professor Morris relies on the fact that Jay's personal draft includes the following important sentence which was erroneously omitted in the newspaper edition:

> "With respect to the responsibility of the President and Senate, it is difficult to conceive how it could be increased." Id. (Emphasis added).

The inclusion of the missing sentence in the authentic draft of The Federalist proves beyond any doubt that Jay was thinking of joint action by the executive and legislative branches, and not action by the President alone, when he referred to the making and cancellation of treaties.

In explaining how a treaty could be terminated, even in case of a breach by the other nation, James Madison, the "Father of the Constitution," wrote on January 2, 1791:

> "That the contracting powers can annul the treaty cannot, I presume, be questioned, the same authority, precisely being exercised in annulling as in making a treaty." 1 Letters and Other Writings of James Madison 524-525 (1865) (emphasis added) 1/

1/ In Madison's words, there are three grounds for legislative participation: 1)"the power vested by the Constitution with respect to Treaties in the President and Senate makes them the competent Judges" of whether to terminate, 2)"as the treaty is a law, the whole Legislature are to judge of its annulment," and 3)"in case the President and Senate be competent in ordinary Treaties, the Legislative authority (may) be requisite to annul a Treaty of Peace, as being equivalent to a Declaration of War, to which that authority alone, by our Constitution, is competent." 1 Letters and Other Writings of James Madison 524-525 (1865). Thus Madison saw a rational basis for distinguishing between treaties according to their subject matter and relationship to other powers of the Congress.

In 1796, James Iredell, one of the leading figures in explaining the Constitution at the North Carolina ratifying convention, wrote that it is Congress alone "to whom, I conceive, the authority is entrusted" for "vacating" a treaty. 2/

In early 1801, when he was still Vice President, Thomas Jefferson wrote in the first manual of Senate procedure:

> "Treaties are legislative acts. A treaty is the law of the land. It differs from other laws only as it must have the consent of a foreign nation. . . .Treaties being declared, equally with the laws of the United States, to be the supreme law of the land, it is understood that an act of the legislature alone can declare them infringed and rescinded." T. Jefferson, A Manual of Parliamentary Practice for the Use of the Senate of the United States, Sec. LII (1801) (emphasis added.)

The statements of other Framers and Founding Fathers are all consistent with and supportive of the above stated conclusions by Madison, Jay, Iredell and Jefferson. For example, it is well known that the Framers were concerned with restoring dependability to our treaties and were anxious to gain the respect and confidence of foreign nations. Alexander Hamilton identifies the want of respect in our treaty relations as one of the most material defects under the Articles of Confederation meant to be cured by the Constitution. 3/ James Wilson, a signer of the Constitution and one of the original Justices of this Court, said at the Pennsylvania Convention to ratify the Constitution that Article III, respecting the judicial department, "will show the world, that we make the faith of treaties a constitutional part of the character of the United States... 4/

2/ See opinion by then Justice Iredell sitting as a circuit judge, reprinted in Ware v. Hylton, 3 U.S. 199 (1796).

3/ The Federalist no. 22, at 151 (Rossiter ed. 1961). In the preface to his notes on debates in the Constitutional Convention, James Madison identified several instances where treaties of the Confederation were violated. These depredations are catalogued by Madison among "the defects, the deformities, the diseases and the ominous prospects for which the Convention were to provide a remedy, and which ought never to be overlooked in expounding & appreciating the Constitutional Charter the remedy that was provided." 3 The Records of the Federal Convention of 1787, at 548-549 (M. Farrand ed. 1937) (hereinafter cited as Records).

4/ 2 The Documentary History of the Ratification of the Constitution 518 (M. Jensen ed. 1976).

It is difficult to believe the Framers, who regarded violation of "the sacred faith of treaties" as "wicked" and "dishonorable" and contrary to our best interests in gaining respect among other nations, would have made treaties repealable at the pleasure of the President alone. 5/

It is also well known that the Framers were concerned with protecting valuable commercial interests and securing increased trade rights. 6/ Specific concern was expressed against making it easy to abridge the common rights of navigation of the Lakes and the Mississippi River which had been won by the United States in the Peace Treaty with Great Britain. 7/ Other Framers mentioned the fear of the New England states that our fishery rights by treaty off Newfoundland might be easily given away. 8/ C. C. Pinckney, a member both of the Federal Convention and his state ratification convention, explained that South Carolina, "considering the valuable produce it has to export, is particularly interested in maintaining the sacredness of treaties." 9/ Gouverneur Morris also pointed to the conclusion that treaties were not to be easily cancelled when he said at the Convention that "the more difficulty in making treaties, the more value will be set on them."10/

5/ So said James Wilson in his Lectures on Law, 1 The Works of James Wilson 166-167 (R. McCloskey ed. 1967).

6/ E.g., 4 Records 58 (Madison's record of subject debated); 2 Records 449 (C.C. Pinckney), 452 (Madison). For a thorough discussion of the preoccupation of the Framers with economic and sectional interests when the treaty clause was debated in the Convention, see also Bestor, Separation of Powers in the Domain of Foreign Affairs: The Intent of the Constitution Historically Examined, 5 Seton Hall L. Rev. 527, 613-619 (1974).

7/ E.g., 1 Records 308 (Hamilton); 3 Records 306-307 (H. Williamson).

8/ George Mason said in the Virginia Convention that "The Newfoundland fisheries will require that kind of security which we are now in want of . . ." 3 Records 335. Gouverneur Morris referred to"the Fisheries or the Mississippi (as) the two great objects of the Union." 2 Records 548. Surely the Framers did not intend to permit the giving away of these two great objects at the whim of a single officer of government.

9/ J. Elliot, 4 Debates in the Several State Conventions of the Federal Constitution 279 (1861).

10/ 2 Records 393 (emphasis added.)

Thus, the Framers sought to give each section of the country an opportunity to exert an influence in the legislature in deciding upon both the making and unmaking of treaties because of the direct effect either action would have upon strong economic or political interests in particular States or regions. The Framers clearly were as interested in protecting these regional interests by making it difficult to revoke beneficial treaties as they were in protecting those interests by guarding against harmful treaties.

Moreover, the intent of the Framers can be derived from their belief that the termination of any treaty, particularly an alliance, might lead to war with the injured nation. George Washington relied on exactly such a warning from his Secretary of State, Thomas Jefferson, in 1793 when he refused to denounce the treaty of alliance with France in part because "an injured friend is the bitterest of foes." Jefferson added that cancellation of the treaty would give "just cause for war" by our treaty partner. 11/

Respondents are correct in observing that the silence of the Constitution on treaty termination is "hardly surprising." But respondents draw the wrong conclusion from this fact. In the words of historian Arthur Bestor:

> "This silence can hardly be considered remarkable in view of the fact that the framers neither discussed nor provided for other comparable procedures notably the repeal of a statute once enacted. The principal concern of the members of these conventions was the proper allocation of the various positive powers of government. Only in exceptional instances did they give attention to the negative use of these powers--in other words, to procedures for undoing or reversing what had once been done." A Bestor, "Respective Roles of Senate and President in the Making and Abrogating of Treaties," 55 Washington Law Review 1, text accompanying notes 67-68 (1979) (to be published).

11/ The Writings of Thomas Jefferson 225, 231 (P. Ford ed. 1895). Rufus King, one of the Framers, similarly advised Alexander Hamilton that the President would not be justified by law in saying the treaty was terminated. D. Malone, Thomas Jefferson and the Ordeal of Liberty 74 (1962). Contrary to the implication of Respondents' Brief in Opposition at page 16, note 7, Hamilton never claimed the French Alliance was "terminated." He agreed as a member of Washington's Cabinet the treaty was not void, but later wrote it could be temporarily "suspended" because the alliance was defensive only and France had initiated offensive war against most of the rest of Europe. VII Hamilton's Works 83-93 (1850-51).

Furthermore, in the absence of specific constitutional instruction on revocations, reversal by those branches participating in the adopting process is the logical procedure of effecting any repeal. This principle was so firmly established in English law that it was adopted in America without question. 12/ Blackstone's famous Commentaries on the Laws of England, which was available to the Framers, gave repeated emphasis to the maxim "that it requires the same strength to dissolve, as to create an obligation." 13/

In summary, it is clear the Framers intended the same principle - that the power to unmake is a corollary of the power to make - to apply to the termination of a treaty, as to the repeal of other law. 14/

12/ Bestor, supra, at text accompanying note 74.

13/ William Blackstone, 1 Commentaries on the Laws of England 160-161, 185-186 (4th ed. 1770). The fourth edition is the one from which the first American edition was reprinted at Philadelphia in 1771-1772.

14/ Also, the Framers may well have been guided by their knowledge that Congress alone could annul a treaty for the United States under the Articles of Confederation. In referring to the Continental Congress, Hamilton advised Jefferson: "It is an obvious truth, and is so stated, that Congress alone has the right to pronounce a breach of the treaty." 6 The Writings of Thomas Jefferson 7 (P. Ford ed. 1895). Absent specific instruction in the Constitution, it is reasonable to conclude that the Framers meant for the legislature to continue to exercise some role in treaty termination, as it had done in the past, insofar as consistent with the other provisions of the document.

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No. 79-856

In the Supreme Court of the United States

OCTOBER TERM, 1979

SENATOR BARRY GOLDWATER, ET AL., PETITIONERS

v.

JAMES EARL CARTER, PRESIDENT OF THE UNITED STATES, AND CYRUS VANCE, SECRETARY OF STATE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-106a) is not yet reported. The opinions and orders of the district court (Pet. App. 107a-152a) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 30, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the President has the constitutional authority to exercise the United States' treaty right to terminate the Mutual Defense Treaty with the Republic of China as part of the process of transferring diplomatic recognition to the People's Republic of China.

2. Whether individual Senators and Representatives, without institutional support for their position, have standing to challenge the validity of the President's termination of the Treaty.

3. Whether petitioners' challenge to the President's termination of the Treaty presents a nonjusticiable political question.

STATEMENT

In December 1978, President Carter announced that, effective January 1, 1979, diplomatic recognition would be transferred from the Republic of China to the People's Republic of China (PRC) as the sole legal government of China. In connection with this transfer of recognition, the President gave notice, pursuant to the termination clause of the Mutual Defense Treaty of 1954 between the United States and the Republic of China, 6 U.S.T. 433, T.I.A.S. No. 3178, that the Treaty would terminate effective January 1, 1980. Petitioners, individual Senators and Representatives, challenge the constitutional validity of the President's termination action.

1. In 1949 the Chinese civil war drove the government of the Republic of China from the mainland to Taiwan. The United States continued to recognize that government as the sole legal government of China and did not enter into any diplomatic relationship with the PRC. Following the Korean War, the United States and the Republic of China concluded the Mutual Defense Treaty of 1954.[1] This Treaty, which was primarily directed against the perceived threat from the PRC, provided that in case of attack on Taiwan, the Pescadores, or United States territories in the Western Pacific, each nation "would act to meet the common danger in accordance with its constitutional processes" (Pet. App. 155a). Article X of the Treaty provided that it would remain in force "indefinitely" but that "[e]ither Party may terminate it one year after notice has been given to the other Party" (*id.* at 156a).

Since 1949 both the PRC and the Republic of China have claimed to be the sole legitimate government of all of China (including Taiwan). In the last 25 years, more than 100 nations, including all of our NATO and ANZUS allies and Japan, have recognized the PRC and broken diplomatic relations with the Republic of China (Pet. App. 5a).

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[1] The Treaty was signed on December 2, 1954. After ratification by the President with the advice and consent of the Senate, the Treaty became effective on March 3, 1955 (Pet. App. 4a).

In the early 1970's, the United States began to pursue closer relations with the PRC. An important manifestation of this policy was President Nixon's 1972 visit to the Chinese mainland. In connection with that visit, the United States and the PRC released the "Shanghai Communique," which declared the goal of "normalization of relations between China and the United States." The PRC stipulated that a prerequisite for full mutual diplomatic relations was an agreement by the United States to cease all official relations with the Republic of China, to withdraw United States military units from Taiwan, and to terminate the Mutual Defense Treaty (Pet. App. 5a).

On December 15, 1978, the United States and the PRC announced their agreement to establish formal diplomatic relations as of January 1, 1979. President Carter announced that recognition would simultaneously be withdrawn from the Republic of China and that the government on Taiwan would be notified that "the Mutual Defense Treaty is being terminated in accordance with the provisions of the Treaty." On December 23, 1978, the Department of State formally notified the Republic of China that the Treaty would terminate as of January 1, 1980 (Pet. App. 6a). Although all official diplomatic ties with the Republic of China have been severed, the United States has sought to preserve "extensive, close, and friendly commercial, cultural and other relations between the people of the United States and the people of Taiwan." Taiwan Relations Act, Pub. L. No. 96-8, 93 Stat. 14, reprinted in Pet. App. 158a-165a.

A normalized political relationship with the PRC is of great significance to the United States' strategic interests in achieving a careful balance of relationships in Asia and the world and in easing tensions between the PRC and United States allies in East Asia. As a consequence of the transfer of recognition, the PRC and the United States have established embassies in each other's territory. The two countries have reached an agreement settling long-outstanding property claims of American nationals against China. In addition, they have recently signed a trade agreement which, if approved by Congress under the Trade Act of 1974, will open a major new market for American industry and agriculture. The PRC and the United States have also concluded cooperation agreements in several fields, including hydroelectric power, science and technology, cultural affairs, and education; important new cooperative arrangements, including a consular treaty and aviation and shipping agreements, are under negotiation. Premier Hua Guofeng is scheduled to visit the United States early next year, and President Carter has accepted an invitation to travel to China after the Premier's visit. Declaration of Warren Christopher ¶ 5 (Feb. 23, 1979); Declaration of Warren Christopher ¶ 4 (Oct. 18, 1979).[2]

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[2] The October 18, 1979 Christopher Declaration was filed by respondents in the court of appeals in support of the motion for expedited treatment and suggestion for *en banc* hearing. The Declaration primarily represents an updating of the ma-

2. On December 22, 1978, the day before the United States' notice of termination was formally communicated to the Republic of China, petitioners filed this suit in the United States District Court for the District of Columbia. They sought a declaration that any action by the President to terminate the Treaty without senatorial or congressional approval would be constitutionally ineffective. They also sought an injunction against any future actions by the President that would "have the effect of terminating, or creating any expectations that the Defense Treaty has been or will be terminated" (J.A. 21).[3] On June 6, 1979, the district court dismissed the suit, without prejudice, for lack of standing. The court reasoned that, because neither the Senate nor the Congress as a whole had utilized the legislative process to assert its power to participate in the decision on terminating the Treaty, petitioners could not demonstrate the injury in fact necessary to support their lawsuit (Pet. App. 141a-152a).

Later the same day, the Senate voted to replace the language in a pending resolution with a substitute expressing the sense of the Senate that termination of mutual defense treaties requires Senate approval. Although no final action was ever taken on this resolution, the district court construed the Senate vote as sufficiently demonstrative of congressional will to establish standing. Accordingly, the court granted petitioners' motion for reconsideration (Pet. App. 112a-120a). The court then concluded that petitioner's complaint presented a justiciable question (*id.* at 120a-125a) and that the Constitution requires formal action by both the President and Congress as a precondition of treaty termination. The court stated that the requirement of congressional participation could be satisfied by obtaining the approval of either two-thirds of the Senate or a majority of both Houses of Congress (*id.* at 125a-140a). The court entered a judgment declaring that the President's notice of termination of the Treaty was ineffective and enjoining the Secretary of State "and his subordinate officers * * * from taking any action to implement the President's notice of termination unless and until that notice is approved as herein declared" (*id.* at 108a).

3. The court of appeals, sitting *en banc*, reversed. The majority held that "in these precise circumstances" the President, on behalf of the United States, is empowered to terminate the Treaty in accordance with its terms (Pet. App. 4a). The court stressed (*id.* at 14a-15a) that its decision was based on various considerations, none of which was necessarily dispositive. On the contrary, the court stated (*id.* at 15a) that "[t]he result we reach draws upon their totality, but in listing them hereinafter we neither assign them hierarchical values nor imply that any one factor or combination of factors is determinative." Chief Judge Wright and Judge Tamm

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terial contained in Deputy Secretary Christopher's earlier affidavit filed in the district court.

We have reproduced both Christopher Declarations as an appendix, *infra*.

[3] "J.A." refers to the joint appendix in the court of appeals.

concurred in the result on the ground that petitioners lacked standing to maintain this action. Judge MacKinnon agreed with the majority's determination that petitioners had standing to sue, but he dissented on the merits.

ARGUMENT

1. The court of appeals' decision is correct and further review is not warranted. The court of appeals repeatedly emphasized that its holding concerned only the validity of the President's termination of the Mutual Defense Treaty of 1954, in accordane with the terms of that Treaty, in conjunction with the President's exercise of his unquestioned unilateral power to transfer diplomatic recognition from the Republic of China to the PRC. The court stated (Pet. App. 26a), in words that could hardly be more explicit: "All we decide today is that two-thirds Senate consent or majority consent in both houses [of Congress] is not necessary to terminate this treaty in the circumstances before us now." The court carefully avoided the adoption of any sweeping rule governing the termination of all treaties at all times and in all circumstances.

To be sure, the President argued in the court of appeals (and he repeats the contention in this Court (see pages 15-23, *infra*)) that, as a consequence of his executive power to conduct the foreign affairs of the United States, the President has broad constitutional authority to terminate the Nation's treaty obligations, without seeking formal approval or acquiescence from Congress. But the court of appeals decided

only the case before it. Notwithstanding petitioners' assertions to the contrary (Pet. 11-13), review by this Court cannot be justified on the ground that the court below has finally settled an important constitutional question whose significance extends far beyond the confines of this dispute.

2. The severe time constraints under which the Court would inevitably labor in seeking to render an effective decision on the merits of the current controversy provide an additional important reason why petitioners' request for further review should be denied. The notice of termination of the Mutual Defense Treaty was given to the Republic of China in December 1978. It remains outstanding. Unless the notice is withdrawn before January 1, 1980, the Treaty will terminate on that date. Assuming *arguendo* that injunctive relief is available against the President ordering him to withdraw a notice already given, such relief would be effective in this case only if granted before January 1, 1980. Otherwise, the Treaty will terminate on that date and, under international law, that termination will be irrevocable, regardless of any subsequent judicial holding that the United States' internal procedures for arriving at the decision to terminate were deficient. See V G. Hackworth, *Digest of International Law* 328 (1943).

If the Court were to rule for petitioners on the merits after January 1, 1980, the only meaningful relief that could be given would presumably be an order reinstating the Treaty until such time as the

Senate or Congress could express its views on the termination decision. But not even petitioners suggest that it is within the judicial power to order a terminated mutual defense treaty back into effect while Congress considers whether it agrees with the termination. Accordingly, even apart from the serious international consequences that can be expected to ensue if this dispute is not finally resolved by January 1 (see App., *infra*), a decision by that date is essential if the case is not to become moot by virtue of the Court's inability to provide an effective remedy after termination.

Having said all this, we turn to an abbreviated discussion of the merits of the controversy. We also elaborate briefly on the reasons why we continue to assert that petitioners lack standing to pursue this litigation and that the case presents a non-justiciable political question.[4]

3.a. As the court of appeals correctly recognized (Pet. App. 27a-29a), one important ingredient in the justification for the President's termination of the Mutual Defense Treaty is that it occurred in the context of a transfer of diplomatic recognition from one government of China to another. Article II, Section 3 of the Constitution provides that the President

[4] Because these latter two points concern the Court's jurisdiction they may appropriately be raised without the filing of a separate petition for a writ of certiorari on behalf of respondents, even though if accepted they would result in a judgment vacating the district court's order and dismissing the complaint rather than an affirmance of the court of appeals' judgment.

"shall receive Ambassadors and other public Ministers." This language has been construed to vest in the President alone the power to confer or withhold diplomatic recognition of foreign states and governments. *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 137-138 (1938); *United States* v. *Pink*, 315 U.S. 203, 229 (1942); *Banco Nacional De Cuba* v. *Sabbatino*, 376 U.S. 398, 410 (1964). The recognition power includes the power to remove obstacles to full recognition, *United States* v. *Belmont*, 301 U.S. 324, 330 (1937), and "the power to determine the policy which is to govern the question of recognition." *United States* v. *Pink*, *supra*, 315 U.S. at 229.

Confronted by the competing claims of two governments, each of which purported to rule all of China including Taiwan, the President determined, in December 1978, that recognition should be transferred from the Republic of China to the PRC. The President's decision to terminate the Mutual Defense Treaty with the Republic of China was solely a consequence of his political decision to transfer recognition. No act of the Senate or the Congress can reverse the President's determination that our former treaty partner is no longer a government with which the United States will maintain formal foreign relations[5] and that it has been replaced by the PRC as the lawful government of the one China.

[5] Contrary to petitioners' assertions, the Taiwan Relations Act does not constitute a *de facto* recognition of the Republic of China. The Act emphasizes that there will be *unofficial relations* with the *people* of Taiwan. In any event, the recog-

As the district court acknowledged (Pet. App. 127a-128a n.46) and petitioners conceded in the court of appeals, there unquestionably are some situations in which the President has the constitutional responsibility to determine whether our Nation's treaties remain effective. See *Clark* v. *Allen*, 331 U.S. 503 (1947); *Charlton* v. *Kelly*, 229 U.S. 447 (1913); *Terlinden* v. *Ames*, 184 U.S. 270 (1902) (President must determine whether circumstances have arisen that render treaty terminable or inoperable under international law); S. Rep. No. 119, 96th Cong., 1st Sess. 10 (1979), reprinted in Pet. App. 23a-25a n.19. Similarly, it is the President who must determine whether the United States can maintain a defense treaty with a defunct government or a non-recognized regime. Once it is recognized that the President, acting alone, can terminate at least some treaties, then the court of appeals' observation concerning the proper role of the judiciary in identifying which treaties fall within that class becomes especially pertinent. The court stated (Pet. App. 26a):

> History shows us that there are too many variables to lay down any hard and fast constitutional rules.
>
> * * * There is no judicially ascertainable and manageable method of making any distinction among treaties on the basis of their substance, the magnitude of the risk involved, the degree of

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nition power is vested in the President alone, and his explicit determination may not be impliedly overriden by a legislative act.

> controversy which their termination would engender, or by any other standards. We know of no standards to apply in making such distinctions.

In light of the close relationship in this case between the treaty termination and the transfer of diplomatic recognition, the court of appeals properly concluded that the President did not exceed his powers in giving the December 1978 notice of termination without first obtaining formal congressional consent.

The court of appeals' decision in this regard is substantially bolstered by the explicit termination clause included in Article X of the Treaty. That provision created a treaty right on behalf of the United States. Termination of a treaty is an international act, and only the President or his subordinates in the Executive Branch may act for the United States internationally. *See, e.g., United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-329 (1936). Under Article II of the Constitution, the President is entrusted with the duty of faithfully executing the laws (Section 3) and is vested with the full "executive Power" of the United States (Section 1). In the absence of some indication to the contrary, the natural inference is that he may exercise any treaty right of the United States, including termination, without returning to the Senate for specific instructions. See *Restatement (Second) of the Foreign Relations Law of the United States* § 163 (1965).

There is no evidence in this case that Congress intended any different practice, nor has the Congress

or the Senate at any time since 1955 purported to take any definitive action with respect to termination of this particular Treaty (Pet. App. 29a-30a). Indeed, in the Taiwan Relations Act, Congress included provisions intended to ensure Taiwan's security, precisely because the President had terminated the Mutual Defense Treaty.[6] Section 4(c) of the Act, which approves President Carter's memorandum of December 30, 1978, continuing in effect all treaties and agreements with Taiwan, clearly applies to all treaties and agreements other than the Defense Treaty. The House committee report on the bill takes note of the President's December 1978 notice of termination of the Defense Treaty and then states that Section 4(c) of the Act "is intended to confirm as a matter of U.S. law the President's statement of December 30, 1978, that all *other* treaties and agreements then in force shall continue in force." H.R. Rep. No. 96-26, 96th Cong., 1st Sess. 11 (1979) (emphasis added).

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[6] During recent legislative debates on S. Res. 15, the resolution introduced by Senator Harry Byrd, Jr., concerning the termination of mutual defense treaties, Senator Frank Church, Chairman of the Senate Foreign Relations Committee, stated: "Another indication that the President's action terminating the treaty with Taiwan was not being directly challenged by Congress was the action by both the Senate and the House of Representatives in writing security provisions into the Taiwan Relations Act. Surely we would not have done this if we had not concluded that it was necessary owing to the President's action in giving notice of the treaty's termination to Taiwan. * * * Indeed, if the Congress had considered the President's action to be constitutionally invalid, there would have been no reason whatever to pass the Taiwan Relations Act." 125 Cong. Rec. S16688 (daily ed. Nov. 15, 1979).

Moreover, even if one assumes that Section 4(c) of the Act does apply to the Mutual Defense Treaty, the Section provides only that treaties with the Republic of China are continued in force "unless and until terminated in accordance with law" (Pet. App. 160a). The President's action challenged here effected just such a termination.

Finally, in considering the proper procedure for terminating the Mutual Defense Treaty, it bears repeating that this Treaty directly implicates the Presidents' power as Commander-in-Chief. Like other defense treaties, the Mutual Defense Treaty was not intended to have, and in fact did not have, any effect on United States domestic law. Article V—the heart of the Mutual Defense Treaty (Pet. App. 155a)—is a political-military contract that remains wholly executory. *See Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253 (1829). It is not amenable to enforcement in the courts; it establishes no rules of decision; it confers no judicially enforceable rights. The President is empowered to terminate the Treaty because only he is empowered to implement it through the exercise of his discretionary authority as Commander-in-Chief. It is beyond dispute that a court could not issue an order compelling the President to send troops to defend Taiwan against attack. See, *e.g.*, *Johnson* v. *Eisentrager*, 339 U.S. 763, 789 (1950).

b. In any event, even if the present controversy is viewed apart from the special characteristics of the Mutual Defense Treaty, the structure of the Constitution and its allocation of power to the President in the area of foreign affairs confirm in more general

terms the correctness of the court of appeals' decision.

Article II vests the "executive Power" of the United States in the President. It elaborates on the specific components of that power and the specific limitations upon their exercise. Among the powers specifically listed and limited is the treaty-making power. U.S. Const., Art. II, Sec. 2. The President's role with respect to treaties is paramount; he negotiates them, signs them, submits them to the Senate for advice and consent, and finally determines whether to ratify them. The President, not the Congress, determines whether the treaty is in effect in international law (*Charlton* v. *Kelly, supra*, 229 U.S. at 471-476; *Terlinden* v. *Ames, supra*, 184 U.S. at 287-288) and the President, not the Congress, interprets the treaty. Cf. *Fourteen Diamond Rings* v. *United States*, 183 U.S. 176, 179-180 (1901). See generally L. Henkin, *Foreign Affairs and the Constitution* 130, 136 (1972).

Moreover, as the court of appeals observed (Pet. App. 19a), most federal powers arise out of specific grants of authority delegated by the states, but the foreign affairs powers of the national government are different. They proceed directly from the sovereignty of the Nation, as this Court recognized in *United States* v. *Curtiss-Wright Export Corp., supra*, 299 U.S. at 318. Even if the Constitution had said nothing about foreign affairs, the powers relevant to the conduct of relationships with foreign nations would have vested in the federal government and, more particularly, in the President, as part of his general executive authority.

In contrast to the broad grant of general executive power to the President, Congress' power is limited to the "legislative Powers herein granted." U.S. Const., Art. 1, Sec. 1. Nothing in the Constitution prescribes any congressional role in treaty termination. The Senate's power to advise and consent to treaties is a specifically defined limitation on the President's broad powers under Article II; there is no constitutional basis for expanding that limitation to situations not enumerated by the Constitution. In the court of appeals' words (Pet. App. 20a), "[i]t would take an unprecedented feat of judicial construction to read into the Constitution an absolute condition precedent of congressional or Senate approval for termination of all treaties, similar to the specific one relating to initial approval."

This Court has reached a similar conclusion in interpreting the virtually identical language of the appointments clause in Article II. *Myers* v. *United States*, 272 U.S. 52, 118 (1926), held that

> [t]he requirement of the second section of Article II that the Senate should advise and consent to the Presidential appointments, was to be strictly construed. The words of section 2, following the general grant of executive power under section 1, were either an enumeration and emphasis of specific functions of the Executive, not all inclusive, or were limitations upon the general grant of the executive power, and as such, being limitations, should not be enlarged beyond the words

> used. Madison, 1 Annals, 462, 463, 464. The executive power was given in general terms, strengthened by specific terms where emphasis was regarded as appropriate, and was limited by direct expressions where limitation was needed, and the fact that no express limit was placed on the power of removal by the Executive was convincing indication that none was intended.

See also 272 U.S. at 128.

The lack of any discussion whatever concerning treaty termination at the Constitutional Convention, and the absence of any constitutional provision imposing specific conditions on Presidential authority regarding treaty termination, are hardly surprising. While there were sound reasons for the Framers to provide a check on the President's ability to entangle the United States in a foreign alliance,

> "disentangling" is less risky and may have to be done quickly, and is often done piecemeal, or *ad hoc*, by various means or acts.

Henkin, *supra*, at 169. The President may need to extricate the United States from a treaty quickly because of breach by the other party, the outbreak of hostilities, or other changed international circumstances; it may be necessary for the President to hold out the possibility of treaty termination as a response to threatened action or actual conduct by a treaty partner. Moreover, the question whether a particular treaty should remain in effect often requires factual judgments that can be made only by the Executive

(such as whether a treaty has been rendered inoperative, obsolete, ineffectual, or impossible to perform or whether a treaty obligation has been fulfilled). The power to terminate in such circumstances is a necessary concomitant of the President's power to exercise fully his constitutional authority to conduct the nation's foreign affairs. *United States* v. *Curtiss-Wright*, *supra*.[7]

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[7] For these reasons, virtually all of the scholars who had addressed the issue prior to the President's termination action in this case supported the President's power to act alone. For example, Professor Henkin wrote in 1972 that the Senate does not have "any authoritative voice in interpreting a treaty or in terminating it." Henkin, *supra*, at 136. Professor Tribe wrote in 1978 that the President "has exclusive responsibility for * * * terminating treaties or executive agreements * * *." L. Tribe, *American Constitutional Law* 164-165 (1978). These views are consistent with those of Alexander Hamilton, who stated:

> [T]reaties can only be made by the president and senate jointly, but their activity may be continued or suspended by the president alone.

Letters of Pacificus and Helvidius on the Proclamation of Neutrality of 1793, at 13 (Gideon, Washington 1845), reprinted in *Treaty Termination: Hearings on S. Res. 15 Before the Senate Comm. on Foreign Relations*, 96th Cong., 1st Sess. 153 (1979) [hereinafter *Treaty Termination Hearings*].

Since the President's termination action in December 1978, there has been a greater diversity of views. However, the majority of those who testified at the Senate Foreign Relations Committee's Treaty Termination Hearings strongly supported the President's power. See testimony of Herbert Brownell, Attorney General at the time the Mutual Defense Treaty was concluded (*id.* at 336-337); testimony of Abram Chayes, Felix Frankfurter Professor of Law at the Harvard Law School and former Legal Adviser of the Department of

The logic of the constitutional arrangement is compelling. Just as the Senate or Congress cannot bind the United States to a treaty without the President's active participation and approval, they cannot continue a treaty commitment that the President has determined is contrary to the security or diplomatic interests of the United States and is terminable under international law. The Senate or Congress cannot undertake, or revive or continue, a treaty obligation of the United States over the President's objection. That is the constitutional scheme.

Petitioners' reliance on Article VI of the Constitution is inapposite. The fact that statutes and treaties are both part of "the supreme Law of the Land" does not establish that they must both be terminated in an identical manner. Statutes and treaties are not adopted in the same manner, and nothing in Article VI requires that they be terminated in the same way. Executive agreements and orders, as well as treaties that have been breached or rendered inoperable by changed circumstances, are also part of "the supreme Law of the Land," yet it is undisputed that they may be terminated by the Presi-

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State (*id.* at 306); testimony of Leonard C. Meeker, former Legal Adviser of the Department of State (*id.* at 319); testimony of William D. Rogers, former Assistant Secretary of State (*id.* at 286); testimony of John Norton Moore, Walter L. Brown, Professor of Law at University of Virginia School of Law (*id.* at 400, 404); testimony of Professor Andreas F. Lowenfeld of the New York University School of Law (*id.* at 443); testimony of Professor Dean Rusk, former Secretary of State (*id.* at 372-73).

dent alone. As the court of appeals observed (Pet. App. 16a-17a), Article VI, Clause 2, is intended to establish the supremacy of federal law over state law, not to define the proper constitutional procedure for termination.

Finally, the historical practice further supports the conclusion that the Constitution does not mandate a specific role for Congress in the termination of treaties. Of the 26 occasions on which the President has acted to terminate a treaty, 13 involved purely Presidential action without the participation of Congress. Several of the treaties in the latter group involved matters of considerable importance. See *Treaty Termination Hearings*, *supra*, at 157-191.[8]

When Congress has participated, that participation has taken diverse forms, negating any inference that

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[8] Petitioners' statement (Pet. 24-25) that 54 treaties have been terminated, but only two by the President alone, is incorrect. Petitioners count one statute that affected particular provisions in 25 treaties as 25 separate cases. Seamens' Act of 1915, ch. 153, 38 Stat. 1164. Petitioners also count statutes that by implication might be thought to authorize termination. But the cited statutes are not in any way inconsistent with the treaties said to have been terminated, and statutes may not supersede treaties by implication. *United States* v. *Payne*, 264 U.S. 446 (1924); *Cook* v. *United States*, 288 U.S. 102, 120 (1933); *Restatement (Second) of the Foreign Relations Law of the United States* § 145(1) at 446 (1965).

Petitioners also repeatedly contend (Pet. 11, 24) that no previous President of the United States has ever asserted the power to terminate a treaty alone. On the contrary, the record shows that the power has been asserted by Presidents Madison, McKinley, Wilson, Coolidge, Roosevelt, Eisenhower, Kennedy, and Johnson. Pet. App. 22a-25a, 126a-127a; *Treaty Termination Hearings*, *supra*, at 157-191.

the Constitution prescribes a specific mode of legislative involvement.[9] The Executive Branch has never claimed that Congress has no role in treaty termination. Through legislation, Congress may nullify the domestic legal implications of a treaty (*Hooper* v. *United States*, 22 Ct. Cl. 408 (1887)), and through the exercise of its enumerated powers, Congress may effectively make it impossible or impractical for the United States to fulfill its treaty obligations. In the past, Presidents have terminated treaties either for these reasons or because they have agreed with Congress' political determination; on some occasions the President has followed the congressional initiative while on others Congress has supported the President's action.

But petitioners have not pointed to a *single* example of a congressional attempt to veto a Presidential decision to terminate a treaty. None of petitioners' historical precedents bears on the proposition fundamental to this case: that the United States

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[9] See *Treaty Termination Hearings, supra*, at 157-191; Pet. App. 167a-171a. In 1936, Green Hackworth, Legal Adviser of the Department of State, reported:

> In some cases treaties have been terminated by the President, in accordance with their terms, pursuant to action by the Congress. In other cases action was taken by the President pursuant to resolutions of the Senate alone. In still others the initiative was taken by the President, in some cases independently, and in others his action was later notified to one or both Houses of Congress and approved by both Houses. No settled rule or procedure has been followed.

V G. Hackworth, *Digest of International Law* 327 (1943).

cannot maintain treaty relations without the continuing concurrence of the President. The only relevant historical precedents are the instances of unilateral Presidential treaty terminations. While petitioners attempt to distinguish these instances from the present case on grounds such as changed circumstances, ineffectuality, or impossibility of performance, they do not explain why the Constitution gives the President, acting alone, the power to terminate treaties in some circumstances, but not in others, nor do they explain by what standards a court is to determine what the crucial circumstances are.

Construed most favorably to petitioners, the historical record demonstrates only that Presidents have long acknowledged their practical and political dependence on congressional acquiescence or concurrence as a prerequisite for the successful maintenance of a treaty obligation. Past practice also shows that the President and Congress have often reached political accommodations to terminate treaties. The most important lesson of the past, however, is the one that is dispositive here: treaty obligations cannot survive, and have never survived, a President's decision to terminate.

4. In addition to the correctness and limited nature of the court of appeals' decision, and the practical problems associated with further review within the relevant time frame, there are two jurisdictional grounds on which petitioners' request for a writ of certiorari should be denied. Without institutional support for their position, petitioners lack stand-

ing to pursue this litigation. Furthermore, their complaint presents a nonjusticiable political question.

a. The concurring opinion of Chief Judge Wright and Judge Tamm properly concludes that individual Senators and Representatives, acting without institutional support or authority, lack standing to seek a binding judicial declaration of the respective constitutional powers of the President and Congress. Before the decision in this case, the federal courts had permitted individual members to assert the institutional prerogatives of the legislature only if the plaintiffs could point to a recent vote that would have had objective legal effect but for the challenged actions of the defendant,[10] or if they obtained passage of a resolution that authorized them to sue on behalf of their colleagues.[11] Absent such a showing of institutional support for his position, a legislator is simply a citizen seeking to use the court "as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System." *United States* v. *Richardson,* 418 U.S. 166, 173 (1974), *quoting Flast* v. *Cohen,* 392 U.S. 83, 106 (1968).

Petitioners nonetheless claim that they can properly litigate the question of the constitutional alloca-

[10] *Coleman* v. *Miller,* 307 U.S. 433 (1939); *Kennedy* v. *Sampson,* 511 F.2d 430 (D.C. Cir. 1974).

[11] *United States* v. *American Telephone and Telegraph,* 551 F.2d 384 (D.C. Cir. 1976); *Senate Select Committee on Presidential Campaign Activities* v. *Nixon,* 498 F.2d 725 (D.C. Cir. 1974).

tion of power in this case because the President's action impaired their interest in voting on the treaty termination question in the most effective possible fashion.[12] The majority of the judges that participated in the court of appeals' decision found this allegation sufficient to confer standing. They explained that "courts consistently vindicate the right to vote without first demanding that the votes when cast will achieve their intended end" (Pet. App. 14a). In this regard, the majority has apparently attempted to draw support from decisions on behalf of persons seeking to vindicate their right to vote in a general election. See, *e.g., Baker* v. *Carr,* 369 U.S. 186 (1962). In such cases, the plaintiff seeks to vindicate a right that is personal to him as a citizen. An individual Senator or Representative who asserts the right to cast a vote on the floor of Congress finds himself in a significantly different position. The right to cast that kind of vote attaches to his office. It is not personal to him. To vindicate his right to cast a symbolic, minority vote on a particular issue regardless of whether the institution as a whole wishes formally to consider that issue would require the courts "to manage the calendar of the United States Senate" (Pet. App. 42a; Wright, C.J., concurring).

[12] The President has not deprived petitioners of an opportunity to vote on the termination question. They have always been free to introduce whatever bills and resolutions they deem appropriate. Indeed, several such resolutions were introduced. The fact that none of them ever came to a final vote is attributable to the actions of other Senators and not to the conduct of the President (Pet. App. 38a-42a; Wright, C.J., concurring).

b. Petitioners' complaint also poses a nonjusticiable political question. The Constitution provides no judicially manageable standards by which a court could grant petitioners' requested relief. *Baker* v. *Carr*, *supra*, 369 U.S. at 217. No constitutional guidance exists for determining whether both Houses of Congress, or solely the Senate, must participate in treaty termination, or whether two-thirds, a majority, or even one-third of the Senate (which could have initially blocked the treaty) are needed to terminate a treaty. Similarly, no standards exist for distinguishing between treaties based on their substance or importance; such distinctions are difficult to ascertain, involve insuperable evidentiary problems, and would inevitably involve a court in making fundamental decisions of foreign policy requiring resolution of disputes between the Executive and Legislative Branches (Pet. App. 26a).[13]

Second, petitioner's complaint with respect to this Treaty presents questions that "uniquely demand single-voiced statement of the Government's views." *Baker* v. *Carr*, *supra*, 369 U.S. at 211. Continued normalized relations with the PRC depend on termination of the Mutual Defense Treaty. For a court now to reinstate that Treaty, or even to cast doubt on

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[13] By ruling in the President's favor on the merits, the court of appeals avoided these problems. While Judge MacKinnon's dissent purports to find a clear constitutional rule that the participation of *both* Houses of Congress is required before a treaty can be terminated, his reasoning is belied by the Treaty Clause itself, which confines participation in the treaty-making process to the Senate.

the effectiveness of the President's termination, would seriously jeopardize the success of the several recent and impending mutually-beneficial agreements between the United States and the PRC.

Finally, as the court of appeals observed (Pet. App. 30a-31a), Congress has ample means within the political process to assert and implement its view on a particular proposed treaty termination. Congress' Article I powers to regulate foreign commerce, raise and support armies and navies, declare war, levy and collect taxes, and spend public funds for the general welfare give it a formidable arsenal of weapons in dealing with the President on questions of foreign policy or in frustrating Presidential initiatives with which a majority of both Houses disagree.

In view of nearly 200 years of successful accommodation and compromise between the political branches of the government regarding the treaty termination process, the courts should decline petitioners' invitation to designate a single constitutionally acceptable method of treaty termination that must be employed in all circumstances. Such judicial intervention would eliminate the flexibility intended by the Framers for our constitutional scheme and, as a consequence, would detract substantially from the efficient and effective conduct of American foreign policy.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1979

APPENDIX

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-2412

SENATOR BARRY GOLDWATER, ET AL., PLAINTIFFS

v.

JAMES EARL CARTER, ET AL., DEFENDANTS

DECLARATION OF WARREN CHRISTOPHER

1. I am the Deputy Secretary of State and have held that office since February 26, 1977. In that capacity I am responsible for the implementation of United States foreign policy, subject to the direction of the President and the Secretary of State. I participated in the development of United States policy for the negotiations with the People's Republic of China (P.R.C.) which led to the decision by our two governments to recognize one another. In so doing I became familiar with the issues concerning the status of Taiwan which required resolution before recognition could be achieved.

2. After establishment of the People's Republic of China in 1949, the "Nationalist" government withdrew to the island of Taiwan and a few other islands off the coast of China. The United States continued to recognize the Nationalist government on Taiwan as the sole legitimate government of China. The rising

tensions of the "Cold War" and the hostilities in Korea heightened U.S. concern for the security of Taiwan, leading to the conclusion of the Mutual Defense Treaty with the Government of the Republic of China on Taiwan in 1954 (the "Mutual Defense Treaty").

3. For nearly thirty years the United States had no diplomatic or other regular relationships with the P.R.C. Today over 100 nations recognize the P.R.C. as the Government of China, including all of our NATO and ANZUS allies, and Japan. In each case official relationships with Taiwan have been terminated. The United Nations admitted P.R.C. delegates as the legal representatives of China in 1971.

4. Commencing with President Nixon's trip to China in 1972, which produced the Shanghai Communique, three American Presidents have worked towards diplomatic relations with China. In order to achieve this goal, the United States and the P.R.C. had to remove the longstanding barrier to reconciliation raised by the Mutual Defense Treaty. The P.R.C. made it clear that continuation of the Treaty was incompatible with normalization of relations and that without its termination, normalization was impossible. The P.R.C. sought an immediate abrogation of the Treaty, but the United States insisted that the Treaty instead be terminated according to its provisions. Having reached agreement on this issue, the leaders of the two countries issued a Joint Communique on December 15, 1978, announcing their agreement to establish diplomatic relations as of January

1, 1979. On December 23, 1978, the United States, acting pursuant to Article X of the Mutual Defense Treaty, gave notice of termination of the Treaty to the Taiwan authorities.

For ease of reference, I have attached as Exhibit 1 the 1972 Shanghai Communique, and as Exhibit 2 the 1978 Joint Communique.

5. It is anticipated that diplomatic relations with the P.R.C. will enhance the well-being of the United States. Official ties will facilitate settlement of outstanding U.S. claims against China and access to a major new market for United States agricultural and industrial products. American farmers and businessmen will be able to compete in that market on an equal basis with their Japanese and European competitors. Similarly, normalization will lead to intensified communication between the American people and the nearly one billion Chinese in the areas of culture, science, and technology, and it sets the stage for the provision of full consular, commercial and other services to Americans in China. Cooperation agreements between our two governments have already been concluded in several areas, including science and technology, cultural affairs, education, agriculture, space, and high energy physics. A consular agreement has also been signed. We are now planning to conclude agreements on claims, trade, aviation, and shipping.

6. At the same time, the United States intends to maintain cultural, commercial and other relations with the people on Taiwan, on an unofficial basis.

The President announced on December 30, 1978, that existing international agreements and arrangements between the United States and Taiwan will continue in force, except the Mutual Defense Treaty which will terminate as of January 1, 1980. 44 F.R. No. 3, January 4, 1979.

The continuation of programs on an unofficial basis will insure a close American relationship with the people on Taiwan. The United States will continue to supply selected defensive military equipment to Taiwan after termination of the Treaty, and will provide follow-on support for U.S. miliary equipment previously transferred. Cultural, commercial and other relations between the people of the United States and the people on Taiwan will be facilitated through a non-profit corporation called the American Institute in Taiwan, with headquarters in Washington and offices in Taiwan.

7. In my judgment a court order interfering with the President's action to terminate the Mutual Defense Treaty would seriously damage the President's capacity to speak and act for the United States in the conduct of its foreign relations, and would disrupt the process of normalization of relations with the People's Republic of China to the detriment of the national interest of the United States. Should the Court hold that the notice of termination of the Mutual Defense Treaty is not valid, it is unlikely that the P.R.C. would move forward with the normalization process, including the signing of agreements, the exchange of ambassadors, the establishment of em-

bassies and consulates, the development of trade, and all of the manifold relationships involved in the establishment of official ties between the two nations.

While all of the consequences of a ruling for the plaintiffs in this case cannot be predicted, it would at a minimum be a serious setback in United States relations with China that could have far-reaching and long lasting consequences.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

/s/ Warren Christopher
WARREN CHRISTOPHER

Executed on 2-23-79
Department of State,
Washington.

EXHIBIT 1

Text of U.S.-People's Republic of China Communique Issued at Shanghai, February 27, 1972

President Richard Nixon of the United States of America visited the People's Republic of China at the invitation of Premier Chou En-lai of the People's Republic of China from February 21 to February 28, 1972. Accompanying the President were Mrs. Nixon, U.S. Secretary of State William Rogers, Assistant to the President Dr. Henry Kissinger, and other American officials.

President Nixon met with Chairman Mao Tse-tung of the Communist Party of China on February 21. The two leaders had a serious and frank exchange of views on Sino-U.S. relations and world affairs.

During the visit, extensive, earnest and frank discussions were held between President Nixon and Premier Chou-En-lai on the normalization of relations between the United States of America and the People's Republic of China, as well as on other matters of interest to both sides. In addition, Secretary of State William Rogers and Foreign Minister Chi Peng-fei held talks in the same spirit.

President Nixon and his party visited Peking and viewed cultural, industrial and agricultural sites, and they also toured Hangchow and Shanghai where, continuing discussions with Chinese leaders, they viewed similar places of interest.

The leaders of the Republic of China and the United States of America found it beneficial to have this

opportunity, after so many years without contact, to present candidly to one another their views on a variety of issues. They reviewed the international situation in which important changes and great upheavals are taking place and expounded their respective positions and attitudes.

The U.S. side stated: Peace in Asia and peace in the world requires efforts both to reduce immediate tensions and to eliminate the basic causes of conflict. The United States will work for a just and secure peace: just, because it fulfills the aspirations of peoples and nations for freedom and progress; secure, because it removes the danger of foreign aggression. The United States supports individual freedom and social progress for all the peoples of the world, free of outside pressure or intervention. The United States believes that the effort to reduce tensions is served by improving communication between countries that have different ideologies so as to lessen the risks of confrontation through accident, miscalculation or misunderstanding. Countries should treat each other with mutual respect and be willing to compete peacefully, letting performance be the ultimate judge. No country should claim infallibility and each country should be prepared to re-examine its own attitudes for the common good. The United States stressed that the peoples of Indochina should be allowed to determine their destiny without outside intervention; its constant primary objective has been a negotiated solution; the eight-point proposal put forward by the Republic of Vietnam and the United

States on January 27, 1972 represents a basis for the attainment of that objective; in the absence of a negotiated settlement the United States envisages the ultimate withdrawal of all U.S. forces from the region consistent with the aim of self-determination for each country of Indochina. The United States will maintain its close ties with and support for the Republic of Korea; the United States will support efforts of the Republic of Korea to seek a relaxation of tension and increased communication in the Korean peninsula. The United States places the highest value on its friendly relations with Japan; it will continue to develop the existing close bonds. Consistent with the United Nations Security Council Resolution of December 21, 1971, the United States favors the continuation of the ceasefire between India and Pakistan and the withdrawal of all military forces to within their own territories and to their own sides of the ceasefire line in Jammu and Kashmir; the United States supports the right of the peoples of South Asia to shape their own future in peace, free of military threat, and without having the area become the subject of great power rivalry.

The Chinese side stated: Wherever there is oppression, there is resistance. Countries want independence, nations want liberation and the people want revolution—this has become the irresistible trend of history. All nations, big or small, should be equal; big nations should not bully the small and strong nations should not bully the weak. China will never be a superpower and it opposes hegemony and power

politics of any kind. The Chinese side stated that it firmly supports the struggles of all the oppressed people and nations for freedom and liberation and that the people of all countries have the right to choose their social systems according to their own wishes and the right to safeguard the independence, sovereignty and territorial integrity of their own countries and oppose foreign aggression, interference, control and subversion. All foreign troops should be withdrawn to their own countries.

The Chinese side expressed its firm support to the peoples of Vietnam, Laos and Cambodia in their efforts for the attainment of their goal and its firm support to the seven-point proposal of the Provisional Revolutionary Government of the Republic of South Vietnam and the elaboration of February this year on the two key problems in the proposal, and to the Joint Declaration of the Summit Conference of the Indochinese Peoples. It firmly supports the eight-point program for the peaceful unification of Korea put forward by the Government of the Democratic People's Republic of Korea on April 12, 1971, and the stand for the abolition of the "U.N. Commission for the Unification and Rehabilitation of Korea." It firmly opposes the revival and outward expansion of Japanese militarism and firmly supports the Japanese people's desire to build an independent, democratic, peaceful and neutral Japan. It firmly maintains that India and Pakistan should, in accordance with the United Nations resolutions on the India-Pakistan question, immediately withdraw all their forces to

their respective territories and to their own sides of the ceasefire line in Jammu and Kashmir and firmly supports the Pakistan Government and people in their struggle to preserve their independence and sovereignty and the people of Jammu and Kashmir in their struggle for the right of self-determination.

There are essential differences between China and the United States in their social systems and foreign policies. However, the two sides agreed that countries, regardless of their social systems, should conduct their relations on the principles of respect for the sovereignty and territorial integrity of all states, non-aggression against other states, non-interference in the internal affairs of other states, equality and mutual benefit, and peaceful coexistence. International disputes should be settled on this basis, without resorting to the use or threat of force. The United States and the People's Republic of China are prepared to apply these principles to their mutual relations.

With these principles of international relations in mind the two sides stated that:

—progress toward the normalization of relations between China and the United States is in the interests of all countries;

—both wish to reduce the danger of international military conflict;

—neither should seek hegemony in the Asia-Pacific region and each is opposed to efforts by any other country or group of countries to establish such hegemony; and

—neither is prepared to negotiate on behalf of any third party or to enter into agreements or understandings with the other directed at other states.

Both sides are of the view that it would be against the interests of the peoples of the world for any major country to collude with another against other countries, or for major countries to divide up the world into spheres of interest.

The two sides reviewed the long-standing serious disputes between China and the United States. The Chinese side reaffirmed its position: The Taiwan question is the crucial question obstructing the normalization of relations between China and the United States; the Government of the People's Republic of China is the sole legal government of China; Taiwan is a province of China which has long been returned to the motherland; the liberation of Taiwan is China's internal affair in which no other country has the right to interfere; and all U.S. forces and military installations must be withdrawn from Taiwan. The Chinese Government firmly opposes any activities which aim at the creation of "one China, one Taiwan," "one China, two governments," "two Chinas," and "independent Taiwan" or advocate that "the status of Taiwan remains to be determined."

The U.S. side declared: The United States acknowledges that all Chinese on either side of the Taiwan Strait maintain there is but one China and that Taiwan is a part of China. The United States Government does not challenge that position. It re-

affirms its interest in a peaceful settlement of the Taiwan question by the Chinese themselves. With this prospect in mind, it affirms the ultimate objective of the withdrawal of all U.S. forces and military installations from Taiwan. In the meantime, it will progressively reduce its forces and military installations on Taiwan as the tension in the area diminishes.

The two sides agreed that it is desirable to broaden the understanding between the two peoples. To this end, they discussed specific areas in such fields as science, technology, culture, sports and journalism, in which people-to-people contacts and exchanges would be mutually beneficial. Each side undertakes to facilitate the further development of such contacts and exchanges.

Both sides view bilateral trade as another area from which mutual benefit can be derived, and agreed that economic relations based on equality and mutual benefit are in the interest of the peoples of the two countries. They agree to facilitate the progressive development of trade between their two countries.

The two sides agreed that they will stay in contact through various channels, including the sending of a senior U.S. representative to Peking from time to time for concrete consultations to further the normalization of relations between the two countries and continue to exchange views on issues of common interest.

The two sides expressed the hope that the gains achieved during this visit would open up new prospects for the relations between the two countries.

They believe that the normalization of relations between the two countries is not only in the interest of the Chinese and American peoples but also contributes to the relaxation of tension in Asia and the world.

President Nixon, Mrs. Nixon and the American party expressed their appreciation for the gracious hospitality shown them by the Government and people of the People's Republic of China.

EXHIBIT 2

JOINT COMMUNIQUE ON THE ESTABLISHMENT OF DIPLOMATIC RELATIONS BETWEEN THE UNITED STATES OF AMERICA AND THE PEOPLE'S REPUBLIC OF CHINA JANUARY 1, 1979

The United States of America and the People's Republic of China have agreed to recognize each other and to establish diplomatic relations as of January 1, 1979.

The United States of America recognizes the Government of the People's Republic of China as the sole legal Government of China. Within this context, the people of the United States will maintain cultural, commercial, and other unofficial relations with the people of Taiwan.

The United States of America and the People's Republic of China reaffirm the principles agreed on by the two sides in the Shanghai Communique and emphasize once again that:

—Both wish to reduce the danger of international military conflict.

—Neither should seek hegemony in the Asia-Pacific region or in any other region of the world and each is opposed to efforts by any other country or group of countries to establish such hegemony.

—Neither is prepared to negotiate on behalf of any third party or to enter into agreements

or understandings with the other directed at other states.

—The Government of the United States of America acknowledges the Chinese position that there is but one China and Taiwan is part of China.

—Both believe that normalization of Sino-American relations is not only in the interest of the Chinese and American peoples but also contributes to the cause of peace in Asia and the world.

The United States of America and the People's Republic of China will exchange Ambassadors and establish Embassies on March 1, 1979.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

D.D.C. Civil Action No. 78-2412

SENATOR BARRY GOLDWATER, ET AL., APPELLEES

v.

JAMES EARL CARTER, ET AL., APPELLANTS

DELCARATION OF WARREN CHRISTOPHER

1. I am the Deputy Secretary of State and have held that office since February 26, 1977. In that capacity I am responsible for the implementation of United States foreign policy, subject to the direction of the President and the Secretary of State, including United States relations with the People's Republic of China (PRC). This Declaration is made to supplement my Declaration in the District Court of February 23, 1979,* and the statements in it are based on my personal knowledge.

2. On October 17, Judge Oliver Gasch issued an opinion declaring that the President's notice of December 23, 1978, is not effective to terminate the 1954 Mutual Defense Treaty with the authorities on Taiwan without further action by the Senate or the Congress. The Treaty is scheduled to terminate on December 31, 1979. In my judgment, Judge Gasch's opinion, unless promptly reversed, would

* Attached to defendants' Motion to Dismiss or, in the alternative, for Summary Judgment filed on February 26, 1979.

have an adverse effect on the developing relationship between the United States and the PRC and cause serious damage to United States foreign relations interests.

3. The decision of the United States and the PRC in late 1978 to normalize relations between the two powers was based on a carefully balanced agreement negotiated with considerable difficulty over a period of several years following the visits of Secretary Kissinger and President Nixon to China in 1972. The PRC firmly maintained that termination of the 1954 defense treaty was a fundamental precondition for normalization. The United States accepted that position because it agreed that maintenance of that Treaty relationship would be incompatible with United States recognition of the PRC as the sole legal government of China and with the attendant derecognition of the authorities on Taiwan. At the same time, the United States maintained with equal vigor the right to maintain unofficial but close commercial, cultural, scientific and technological ties with Taiwan. In addition the United States made clear its continued interest in the peaceful resolution of the Taiwan issue and its right to continue to supply Taiwan with carefully chosen defensive military equipment as well as follow-up support for previous arms transfers after the defense treaty is terminated. Normalization would not have proceeded on any other basis.

4. The United States established diplomatic relations with the People's Republic of China and terminated the Mutual Defense Treaty according to its

own terms in order to obtain the benefits of normalization for the American people. As a direct result of normalization, China and the United States have established embassies and consulates on each other's territory. We have concluded an agreement settling long-outstanding property claims of U.S. nationals against China. The two parties have recently signed a trade agreement which, upon approval by Congress, will open a major new market for U.S. industry and agriculture. To support American business competition in this market, China and the United States have agreed in principle on the extension of $2 billion in U.S. Export-Import Bank credit and on Overseas Private Investment Corporation guarantees. Detailed discussions on these matters will begin shortly.

The new opportunity for intergovernmental consultation on matters of common concern has led to the visit of the Vice President and numerous members of the cabinet to China, and visits by China's Vice Premier and ministers of the Chinese Government to the United States. Chinese Premier Hua Guofeng is scheduled to visit the United States early next year, and President Carter has accepted an invitation to travel to China after Premier Hua's visit. Cooperation agreements have already been concluded in several fields, including hydro-electric power, science and technology, cultural affairs, and education; and important new cooperative arrangements, including a consular treaty, as well as aviation and shipping agreements, are under active

negotiation. At least 40,000 Americans have visited China so far this year.

5. A normalized political relationship with the PRC is of great significance to the strategic interest of the United States in achieving a careful balance of relationships in Asia and in the world. We have been encouraged at the easing of tensions between the PRC and United States allies in East Asia. Continued reapproachment between our two nations is the best assurance of a peaceful resolution of the Taiwan issue that protects the interests of Taiwan's poeple as well as our flourishing cultural and commercial relationship with them. Since normalization, two-way U.S. trade with Taiwan has continued to develop, increasing to an estimated $10 billion in 1979.

6. There can be no doubt that the opinion of the District Court, holding the President's notice of termination ineffective without further Congressional action, is inconsistent with a basic tenet of the United States agreement with the PRC on normalization of relations. Unless that opinion is reversed without delay, there is the risk that the PRC will feel obliged to reconsider the entire relationship and a reversal of steps already taken is a distinct possibility. If this situation is not finally resolved in advance of December 31, the consequences could be serious indeed, and of long lasting disadvantage to the United States.

7. In my considered judgment, it is essential that this matter be resolved as soon as possible to dispel doubts in the PRC concerning the reliability of the

President's commitments and to remove a serious cloud now hanging over the normalization of relations between the United States and China.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

/s/ Warren Christopher
WARREN CHRISTOPHER

Executed on October 18, 1979
Department of State,
Washington.

AGREEMENTS CONCLUDED BETWEEN THE UNITED STATES AND THE PEOPLE'S REPUBLIC OF CHINA

Agreement concerning the settlement of claims. Signed at Beijing May 11, 1979; entered into force May 11, 1979. TIAS 9306.

Agreement on the mutual establishment of consular relations and the opening of consulates general, with annex. Signed at Washington January 31, 1979; entered into force January 31, 1979. TIAS 9177.

Cultural agreement. Signed at Washington January 31, 1979; entered into force January 31, 1979. TIAS 9178.

Agreement relating to an educational exchange program in scientific and scholarly fields. Concluded at Washington October 20, 1978; entered into force October 20, 1978 (incorporated into January 31, 1979 agreement).

Agreement on cooperation in science and technology, with exchange of letters. Signed at Washington January 31, 1979; entered into force January 31, 1979. TIAS 9179.

Agreement on trade exhibitions. Signed at Beijing May 10, 1979; entered into force May 10, 1979. TIAS 9470.

Agreement on trade relations. Signed at Beijing July 7, 1979; enters into force on the date the contracting parties exchange notifications that each has completed the legal procedures necessary for entry into force.

Agreements implementing the agreement of January 31, 1979 on cooperation in science and technology:

Implementing accord on cooperation in the field of high energy physics. Signed at Washington January 31, 1979.

Annex to implement accord on cooperation in the field of high energy physics. Signed at Beijing June 12, 1979.

Cooperative program in high energy physics for June 1979 - June 1980. Signed at Beijing June 12, 1979.

Protocol on cooperation in the fields of atmospheric science and technology, with annexes. Signed at Beijing May 8, 1979.

Protocol on cooperation in the field of marine and fishery science and technology with annex. Signed at Beijing May 8, 1979.

Protocol on cooperation in the fields of metrology and standards, with annex. Signed at Beijing May 8, 1979.

Protocol on cooperation in the fields of management of science and technology and scientific and technical information, with annex. Signed at Beijing May 8, 1979.

Protocol for cooperation in the science and technology of medicine and public health. Signed at Beijing June 22, 1979.

Protocol on cooperation in hydroelectric power and related water resource management. Signed at Beijing August 28, 1979.

(All of the implementing agreements entered into force upon signature.)

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 306794 158

No. 79-856

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

SENATOR GARRY GOLDWATER, ET AL., PETITIONERS

v.

JAMES EARL CARTER, PRESIDENT OF THE UNITED STATES, AND CYRUS VANCE, SECRETARY OF STATE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONERS' REPLY TO BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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We believe it important to reply to the Respondents' in terrorem argument, at pp. 8-9of their Brief in Opposition, that this Court must rule before January 1, 1980, "/o/therwise, the treaty will terminate on that date and, under international law, that termination will be irrevocable, regardless of any subsequent judicial holding that the United States' internal procedures for arriving at the decision to terminate were deficient."

This is simply not so.

The issue being litigated is whether the President possessed constitutional power to terminate the treaty without any kind of congressional concurrence. If he did not, his action was, and remains, ineffective as domestic constitutional law, unless and until that concurrence is obtained. An invalid act, challenged in pending litigation, does not acquire legitimacy by aging, during the time that the case is being considered in the courts. This Court's judgment reversing the court of appeals would have exactly the same effect if rendered in 1980 as it would have if rendered in 1979.

There is nothing in international law to the contrary. If the U. S. Constitution requires the concurrence of Congress, that is the end of the matter. Even if, contrary to fact, the Republic of China were for some reason seeking to rely on the President's notice of termination, Article 46 of the Vienna Convention on Treaties would put the ROC (and the international community) on notice, in view of the pendency of this litigation, that the defect in the President's constitutional authority "was manifest and concerned a rule of its /i.e., U.S./ internal law of fundamental importance," hence cannot be taken to be the act of the United States unless and until the deficiency is cured by congressional action. The fact, of course, is that the Republic of China promptly protested the termination as being in violation of international law (R. 171). See Appendix A to this Reply.

The answer to Respondents' resuscitation argument, that the judicial power could not order a terminated treaty back into effect, is in Article X of the Treaty itself. It says that "This treaty shall remain in force indefinitely. Either Party may terminate it one year after notice has been given to the other party." If the notice of termination has not been validly given in consequence of lack of congressional concurrence, the treaty, by its terms, remains operative indefinitely, and does not need to be "ordered back into effect."

The President could not impose "severe time restraints on this court" by an ultra vires act. If his notice of termination was ineffective, so also was the date that it prescribed.

The Court has jurisdiction to decide this case effectively at a time which suits its own convenience.

Respectfully submitted,

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December 8, 1979

APPENDIX A TO
PETITIONERS' REPLY TO BRIEF OF RESPONDENTS
IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Taipei, December 31, 1978

Your Excellency,

The Government of the Republic of China has been given notice by the Government of the United States of the termination of the Mutual Defense Treaty one year after the date of January 1, 1979.

The Government of the Republic of China has scrupulously observed its obligations under the Mutual Defense Treaty, and has never violated any provisions of that treaty. For the U.S. Government to unilaterally give notice of termination for no justifiable ground is wholly unthinkable.

In accordance with the principles of international law, the cause and spirit constitute the basis of the provisions of a treaty. To terminate the Mutual Defense Treaty unilaterally without prior consultations violates the basic spirit of the provisions of the treaty.

There has been no vital change of circumstances since the signing of the Mutual Defense Treaty and the termination of the treaty can never be justified on the ground of rebus sic stantibus (the principle of changed circumstances).

The Government of the Republic of China deplores the unilateral termination of the Mutual Defense Treaty and lodges its strongest protest with the Government of the United States.

I avail myself of this opportunity to convey to Your Excellency the assurances of my highest consideration.

Tsiang Yien-si

Tsiang Yien-si
Minister of Foreign Affairs

His Excellency
Leonard Unger
Ambassador Extraordinary and Plenipotentiary
United States Embassy, Taipei

MOTION FILED
DEC 6 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-856

SENATOR BARRY GOLDWATER, ET AL., *Petitioners,*

v.

PRESIDENT JAMES EARL CARTER AND
SECRETARY OF STATE CYRUS R. VANCE, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION OF MYRES S. McDOUGAL AND W. MICHAEL REISMAN FOR LEAVE TO FILE BRIEF AMICI CURIAE

and

BRIEF AMICI CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

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Amici Curiae

December 6, 1979

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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1. Pursuant to Supreme Court Rule 42(3), Myres S. McDougal and W. Michael Reisman, as professors who specialize in international and constitutional law and have written and testified in the Senate on the issues raised in the instant case, and who, as citizens and lawyers, are concerned about the integrity of constitutional procedures in the conduct of foreign affairs

of the United States, move the Court for leave to file, as *amici curiae,* the attached brief in support of the petition for certiorari.

2. This case is of major interest and concern to many lawyers and citizens. If the Court of Appeals' decision is allowed to stand, it will enormously increase the power of one person to terminate international agreements to which the United States is party, all but abrogating the historic constitutional procedures by which Congress was vouchsafed a role in a key part of the treaty process and through which political power in our system has been checked and balanced. Externally, it will weaken rather than strengthen the foreign affairs power, for henceforth foreign governments will no longer be able to rely on the durability of our treaties, since they will be terminable at the will of one person.

3. Many lawyers and citizens are particularly concerned because the decision of the Court of Appeals is candidly expedient, globalizes the foreign affairs power into a single factitious entity and fails to distinguish the different sequential phases in the processes of making and terminating agreements, treats constitutional history in a somewhat cavalier fashion, and ignores the extent to which it will actually impair the Executive's future conduct of foreign affairs.

4. Petitioners have consented to the filing of a brief *amici curiae* in support of the petition for certiorari. A request for consent to file such a brief was rejected on behalf of respondents by Kenneth Geller, Esquire, of the Solicitor General's office in a telephone conversation on December 4, 1979.

5. In light of the substantial impact of the Court of Appeals' decision, if permitted to stand, on the interests and concerns of all citizens, the Court is urged to grant this motion and to grant leave to file a brief *amici curiae* in support of the petition for certiorari.

Respectfully submitted,

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December 6, 1979

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BRIEF AMICI CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

INTEREST OF AMICI

A description of *Amici* and their interest is set forth in the preceding Motion for Leave to File Brief *Amici Curiae* in Support of Petition for Certiorari.

REASONS FOR SUPPORT OF THE PETITION

The issue raised by the decision of the Court of Appeals, one of first impression in the history of the Republic, is of increasing importance to our political and legal system: whether the Congress is to have any constitutional role in any of the sequences of decision comprised in the process of termination of treaties.

With the growth of international interdependence and the increasingly permeable line between foreign and domestic affairs, the number and importance of international agreements in national policy making and execution is being steadily enlarged. Moreover, many agreements involve major commitments in the nation's destiny. Thus, the exclusion of the Congress from the termination of all agreements imports a radical restructuring of our constitutional system in favor of the Executive, not for peripheral and ephemeral matters, but for matters which may be of the greatest national concern. Even if such a development should be considered desirable, it should not be accomplished through a decision which is candidly expedient, which globalizes the concept of a foreign affairs power into a single factitious entity and fails to distinguish the very different sequential phases in the processes of making and terminating agreements, which treats constitutional history in a somewhat cavalier fashion and which, while accepting the detrimental domestic consequences of its decision, completely ignores the extent to which its decision will actually *impair* the Executive's future conduct of foreign affairs.

The Court of Appeals isolates the conduct of foreign affairs from domestic activities and globalizes the foreign affairs power, assigning all of it to the Executive, as the exclusive "organ," it says repeatedly, of the nation in external affairs. That is a dangerously misleading metaphor. Foreign affairs is a bundle of competences, many of which are shared or divided sequentially as a way of checking and balancing power in our system. The enumerated powers of the Congress have been regarded from the beginning of our history as including the competence to authorize and approve

international agreements and would indeed be relatively meaningless in the absence of such competence. The President does not, for example, "make" agreements; Congress is assigned key and indispensable roles in a number of the sequences of agreement making. While the President is indeed the exclusive actor in certain communications abroad such as negotiation and ratification, he is only the organ. He alone is not the organ grinder.

Globalization obscures the sequences involved in the making and termination of agreements. The shaping of policies by agreement involves three broad functions, each of which reflects a different internal allocation of competence. The first is the making of agreements, for which there is both constitutional text and abundant practice indicating an intricate distribution of competence between the President and the Congress, with flexibility for context, level of crisis and so on. The second function is the performance and enforcement of agreements, also a matter of shared competence. The third function is that of terminating agreements once they have served their purpose.

Much of the confusion surrounding the discussion of this third function may be traced to the failure to analyze sequentially what is involved in the termination of an agreement. It is not a single act, over which the Constitution gives one or another branch full competence. It is a complex sequence of acts, for each of which the Constitution and constitutional practice have established and maintained different configurations of competence. It includes:

1) the formulation of the policies whether an agreement should be terminated (modified or suspended) and the authorizing of such termination;

2) the conduct of negotiations to effect termination;

3) the repeal of the law of the land established by an agreement; and

4) the giving of formal notice to the other party of the termination of the agreement.

It is apparent that the Court of Appeals, like many commentators, has confused the treaty termination issue by referring simultaneously and indiscriminately to many of these sequences.

Nor is the Court of Appeals' review of constitutional history satisfactory. The constitutive document of 1789 does not deal explicitly with a termination competence. Some scholars and high officials have responded to this silence in astonishing ways. A number have argued that, in the absence of a provision withholding power, it is to be assumed that the Constitution gives all power to the President in this important matter. This is a dangerous notion which if taken seriously could undo our historic constitutional arrangements. Where there is an apparent gap in the basic constitutive document, the appropriate juridical task is to refer to the fundamental purposes of the entire constitutive enterprise, to see how those purposes can best be served in the gap area in ways consistent with freedom, security, efficiency and all other policies.

In our system of a complex allocation of competences and historic checks and balances, designed after several millennia of experience to preserve freedom, it is simply preposterous to conclude in the absence of express provision that a comprehensive, exclusive power goes to the President. Where we deal with international

agreements which are the law of the land, including many for whose prescription and termination the whole Congress is assigned a major constitutional role, the assumption that the termination of that law is solely an executive function is, to say the least, far from self-evident. Where we deal, as in defense treaties, with matters involving the preparation for and contingent declarations of war—a manifestly congressional competence under the Constitution—the assumption of a shared competence is even stronger.

Not surprisingly, termination practice during the past 200 years has transpired in extraordinarily varied political circumstances and has been equally and appropriately varied. But, contrary to the President's position, there is no clear past precedent to support an unauthorized executive termination against the wishes of Congress. The expectations created by past practice are entirely opposite.

Internationally, the decision of the Court of Appeals, rather than strengthening the foreign affairs power in respect to treaties, actually weakens it. Prior to the decision below, treaty partners could assume that, if the United States chose the modality of the treaty for an international agreement as against two other more informal modalities, then it was intentionally making an agreement that was insulated, through constitutionally mandated procedures, from capricious terminations or from unilateral termination as a result of threats from a third party. If the decision below is permitted to stand, then, at the very best, prospective treaty partners will not be able to gauge how much to rely on a treaty; at the very worst, they will conclude that the United States can no longer make durable agreements.

In our opinion, the better constitutional view, confirmed by a careful examination of past instances of termination, is that in the absence of material breach or *rebus sic stantibus* and, arguably, in the absence of an overwhelming external crisis to the body politic, the presumption must be that the President requires congressional authorization to terminate any agreement other than a presidential agreement. Where the agreement falls squarely in an area of competence which the Constitution gives to Congress, such as war and defense, and where the modality of agreement chosen is a treaty or congressional-executive agreement, the presumption requiring congressional authorization for termination becomes virtually absolute.

One of the most destructive aspects of the Court of Appeals' decision is that it creates expectations about future constitutional competence while claiming that it is not deciding the larger issue. The Executive emerges from the Court of Appeals believing that its claim of exclusive constitutional competence has been vindicated, while a number of congressmen aver that they will henceforth insert reservations in treaties as to termination procedure. But, if the issue of general competence has in fact been decided, such reservations will not avail. The prospect is one of more internal conflict, a development the Court of Appeals seems to accept by its bland *renvoi* of the matter to "political" arrangements. In this respect, the court below has failed to discharge its mandate in a constitutional case, which is to decide in ways that clarify competences for future decision.

The question in this case is not the political one of whether the treaty with Taiwan should be terminated, but the legal one of by what constitutional procedures

our country should make such a choice. In our view, this case urgently requires review by the highest tribunal, lest serious errors of law and a decision patently based on considerations of expediency rather than of constitutional law stand and distort our historic constitutional framework. The costly-bought sharing and balancing of power in our constitutional process, which has so long served our freedoms so well, should not lightly be abandoned.

Respectfully submitted,

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December 6, 1979